TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 411.

VICTOR FRAENKL AND JOHN H. LUIS, COPARTNERS UNDER THE FIRM NAME OF JAFFE BROTHERS & COMPANY, AND JOBST HINNE AND HERMAN WOLFRAM, COPARTNERS UNDER THE FIRM NAME OF HINNE & COMPANY, APPELLANTS,

vs.

MANUEL CERECEDO, ENRIQUE CERECEDO, JOSE CERECEDO, AND FRANCISCO CERECEDO, COMPOSING THE COPARTNERSHIP OF CERECEDO HERMANOS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED APRIL 7, 1909.

(21,589.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1909.

1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a stated term of the District Court of the United States for Porto Rico, within and for the District aforesaid, begun and held at the court-room of said Court in the city of San Juan, on the second Monday of October, being the twelfth day of that month, in the year of our Lord One Thousand Nine Hundred and Eight, and of the Independence of the United States of America the one hundred and thirty-third.

Present: The Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a Final Decree in the following cases, to wit:

No. 6, Mayaguez.

JAFFE BROS. & CO. et al.
vs.
J. FERNANDEZ & CO. et al.,

and

No. 147, San Juan.

CERECEDO BROS.
vs.
JAFFE BROS. & CO. et al.

Be it remembered, that heretofore, to wit, on the nineteenth day of November, A. D. 1900, came the complainants by their attorneys and filed their Bill of Complaint in this cause, which said bill is as follows, to wit:

Bill for Receiver and Other Relief.

JAFFE BROS. & CO. et al.
vs.
J. FERNANDEZ & CO. et al.

To the Honorable the Judge of the United States District Court for the District of Porto Rico, in Chancery Sitting:

Victor Fraenkl and John H. Luis, who are subjects of the
2 Queen of Great Britain and Ireland, as copartners doing business in the city of Dundee, Scotland, under the firm name of Jaffe Brothers & Company, and Jobst Hinne and John Doe, who are subjects of the Emperor of Germany, as copartners doing business in the city of Berlin, Germany, under the firm name of Hinne & Company, bring this their bill of complaint against José Fernandez,

as the active and general partner in the mercantile firm of J. Fernandez & Company, formerly doing business in Mayaguez, Porto Rico, and as the liquidator of said last mentioned firm, Manuel Cerecedo, Enrique Cerecedo, José Cerecedo and Francisco Cerecedo, as copartners doing business in the City of San Juan, Porto Rico, under the firm name of Cerecedo Hermanos; Victor Martinez; Demetrio Bolta; and Alfredo Arnaldo y Sevilla—all said defendants being residents and citizens of Porto Rico.

And thereupon your orators, complaining, say that the above described firm of J. Fernandez & Company is a partnership formed under the laws of the Kingdom of Spain while the Island of Porto Rico was under that dominion and composed of both general and special partners; that the defendant J. Fernandez was the only active and general partner in said firm, but the defendant firm of Cerecedo Hermanos and the defendant Victor Martinez were special partners therein, each of them having contributed to the capital of said firm, as your orators are informed and believe, the sum of ten thousand pesos, provincial money; and that said defendants Cerecedo Hermanos and Victor Martinez remained special partners in said firm of J. Fernandez & Company as aforesaid up to the time of the suspension of payment by said firm and the happening of the various other events as hereinafter specified and alleged.

Your orators further represent that the said defendant firm of J. Fernandez & Co. are justly indebted to your orators severally in the following amounts, which have been acknowledged by said firm to be correct, to wit: To your orators Jaffe Brothers & Co. in the sum of two thousand three hundred and eight pounds sterling,
3 eleven shillings and sixpence, due since the thirty-first day of December, 1899, with interest thereon at the rate of six per cent per annum, and to your orators Hinne & Co. in the sum of eight thousand and sixty eight marks, due since the 30th day of June, 1900, and with the exception of 472 marks due since Dec. 31, 1899; the said indebtedness to both of your orators having been incurred by the purchase of merchandise upon open account.

Your orators further represent that early in the spring of the year 1880 the said defendant firm of J. Fernandez & Co., becoming embarrassed in their business, fraudulently conspired and combined together with the other defendants herein, including the special partners of said firm as aforesaid, so to manage and manipulate the affairs of said defendant firm and so to dispose of its assets as to defraud its creditors out of a large part of what was due to them; that, in pursuance of this fraudulent plan and purpose, when your orators Jaffe Brothers & Co. in the month of February last made demand of payment of the amount so due to them as aforesaid, the defendant J. Fernandez, as the active and managing partner of said firm, conspiring with the other defendants as aforesaid and so intending to delay, embarrass and defeat said orators in the collection of their debt and avoid the immediate enforcement thereof, fraudulently entered into an agreement with said orators, drawn by and executed before the defendant Alfredo Arnaldo y Sevilla as Notary, whereby said defendant agreed to transfer and deliver to them certain guar-

anties and securities for the payment of said debt as specified and enumerated in said Notarial agreement, a true copy of which with translation into English is herewith filed marked "Exhibit A" and prayed to be taken and considered as a part hereof. Your orators aver upon information and belief, that the said defendant did not at the time of executing said agreement intend to abide by or carry out the terms thereof but merely to mislead and deceive said orators so as to obtain further delay in the demand of payment thereof;

4 and that the defendant Alfredo Arnaldo y Sevilla, Notary as aforesaid, combining and confederating with the other defendants, fraudulents- persuaded the representative of your said orators, although said representative requested and required that a date for the transfer and delivery of said securities be specified therein, that the fixing of said date was impossible on account of certain proceedings yet to be taken for the perfecting of said securities, which representation was fraudulent and untrue; that by the representation and subterfuge aforesaid said firm of J. Fernandez & Co. obtained a delay from said orators, and upon further demand for the carrying out of said agreement specifically said defendant J. Fernandez, as the representative of his said firm, proposed that said agreement be modified by making the transfer of said securities an absolute payment of their said indebtedness so far as the assessed value of said securities would go, which proposition was accepted by the representative of said orators, but as said representative had not at that time sufficient express power to accept payment in the form proposed he notified said defendant J. Fernandez that he would write his principals for the transmittal of such a power, and that upon said defendant J. Fernandez being notified of the forwarding of the proposed power by said orators he forthwith sought to avoid the performance of his said promise by fraudulently applying on behalf of said firm on April 26, 1900, for an order of suspension of payments under the *laws* of Porto Rico, and accomplished the same by the fraudulent means hereinafter specified in further pursuance of their purpose to defraud their creditors.

Your orators further represent that nearly or quite one half of the bona fide indebtedness of said defendant firm of J. Fernandez & Co. was and is held by European creditors, the amount of such indebtedness being not less than thirty-eight thousand dollars, while the total bona fide indebtedness of said firm is less than one hundred thousand dollars and that in order to comply with the provisions of

5 the law which required that the meeting of their creditors should be attended by four-fifths in amount of indebtedness, without waiting to notify the European creditors and also in order fraudulently to obtain a majority of the supposed creditors at said meeting who would vote for such Trustees or Syndicos as were agreeable to, and would comply with the wishes of, the said conspirators, the said firm fraudulently issued false and fictitious evidences of indebtedness to such an amount as to bring the alleged total indebtedness of said firm to more than two hundred thousand dollars. And your orators specify as among the fraudulent and fictitious evidences of indebtedness above alleged the supposed large

amounts payable to said defendant special partners, to wit: twenty-seven thousand dollars to Cerecedo Hermanos and seventeen thousand five hundred dollars to Victor Martinez, and also a note of twelve thousand dollars to Eliseo Font y Guillot, as well as other of smaller amount, your orators being unable to ascertain the exact amount of such fictitious indebtedness without the aid of this honorable court. And your orators allege that none of the foreign creditors of said firm were notified of, or attended upon, the aforesaid meeting of creditors of said firm, and that only by the fraudulent and fictitious increase in the apparent indebtedness of said firm were the said defendants able to comply with the law in securing the necessary four-fifths at said creditors' meeting and so to carry out said fraudulent suspension of payments and to obtain the appointment of the Trustees who would assist them in said fraud.

Your orators further represent that it is by the laws of Porto Rico provided that upon an order for suspension of payments being granted the parties so placed in suspension of payments shall be prohibited from further transferring or otherwise disposing of their property other than for the purpose of paying the debts of said firm or for carrying out its contract obligations existing at the time of such suspension of payments; that among the securities specified in the said agreement filed herewith as "Exhibit A" was a mortgage from the Sucesión de Muñoz Portilla for the sum of one
6 thousand nine hundred and eighty-two pesos, seventeen centavos, provincial money, another mortgage from Angel Garcia for the sum of twenty-five hundred pesos, provincial money, and a claim against Francisco Tomasini for the sum of ten thousand nine hundred pesos, provincial money, all of which with other properties were to be transferred to your orators Jaffe Brothers & Company as therein provided and after the act of suspension of payments as aforesaid there was no legal right in any member of the said firm to dispose of said assets otherwise than by collection of the same for the benefit of their creditors, or whoever should be entitled, or for the carrying out of their said contract with orators Jaffé Brothers & Company; yet in the month of October last the said defendant J. Fernandez, claiming to act as Liquidator as aforesaid, made before the defendant Alfredo Arnaldo y Sevilla, as Notary Public, three several notarial deeds whereby he attempted to sell and assign the said securities to the defendant Demetrio Bolta for a pretended consideration of one-half of their face value in each case. And your orators allege that said defendant J. Fernandez caused, and the defendant Alfredo Arnaldo y Sevilla permitted, it to be falsely and fraudulently recited in one or more of said notarial deeds that said securities were not subject to, or affected by, any previous liens or obligations whatsoever, although both of said defendants well knew of the existing agreement in favor of said orators Jaffé Brothers & Company.

Your orators further represent that said defendant Demetrio Bolta was not the actual purchaser of the said securities as fraudulently stated in the said several notarial deeds but that said transfer of said securities to him was wholly simulated and fraudulent without the

payment of any real and bona fide consideration therefor, and made for the sole purpose of defrauding out of the same the creditors of said firm of J. Fernandez & Company, and especially your orators Jaffé Brothers & Company; that the pretended consideration recited in said notarial deeds as paid by said defendant Demetrio Bolta was only fifty per cent of the face and real value thereof but said fifty per cent of said values amounted to the sum of three thousand one hundred and eighty-one and 52/100 dollars gold, which is a far larger sum than said defendant then possessed or controlled; that said defendant Bolta was then and is now a man of no available property or financial resources, who previous to the time of this alleged purchase had himself sought refuge from his creditors in a suspension of payments; and that the name of said Demetrio Bolta was used in said assignments as a man of straw, the real assignees and the present fraudulent owners of said securities being the said defendants Cerecedo Hermanos and Victor Martinez. And your orators further allege upon information and belief that the said transfers or assignments of said securities were first drawn by said defendant Alfredo Arnaldo y Sevilla, as Notary as aforesaid, with the names of the said Cerecedo Hermanos and Victor Martinez as the purchasers or assignees therein; and that the same was changed and the name of said Bolta inserted in their place when they became aware that by such act they would render themselves criminally liable; and that said securities are still legally the property of said J. Fernandez & Co. except so far as they are affected by the agreement heretofore referred to as "Exhibit A."

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Your orators further represent that, although it is illegal for a firm which has been declared in suspension of payments to transfer or dispose of any property except through the Syndicos selected for that purpose to be applied to the pro rata payment of their creditors, yet the said defendant J. Fernandez after the order of suspension of payments and after the selection and qualifications of the Syndicos not only transferred the said securities in the manner aforesaid but has also fraudulently and clandestinely, either without the knowledge of the said Syndicos or with their connivance, delivered and turned over to said special partners, the defendants Cerecedo Hermanos and Victor Martinez, in fraud of their creditors goods and personal property of said firm of J. Fernandez & Co. to a large amount, the exact amount and character thereof being unknown to your orators; and that the said Trustees or Syndicos selected by the meeting of creditors at which the fraudulent indebtedness created by the defendants herein was represented are paying very little attention to the affairs of the said defendant firm, but are completely under the domination of said defendant J. Fernandez and allow him to manipulate the affairs and assets of said firm in whatever way he may desire.

8

Your orators further represent that by reason of the matters hereinbefore set forth it is impossible to ascertain whether said firm of J. Fernandez & Co. is or not in truth and in fact insolvent; that the only persons possessing such knowledge are the defendants in this suit; but that, whether said firm is solvent or insolvent, it has been

and is the fraudulent intention of the defendants herein to waste, secrete and divert the assets of said firm to their own benefit and fraudulently to avoid the payment of the creditors of said firm and especially of your orators; and that, while careful and honest management of the affairs of said firm and proper and energetic efforts to set aside and repair the effects of the fraudulent and illegal acts of the defendants already committed would enable the creditors to realize from its assets all or nearly all of their bona fide claims, if its affairs continue to be manipulated and its assets dissipated and diverted by the fraudulent methods heretofore employed, and unless a Receiver for the winding up of the business of said firm is appointed by this honorable Court, very little will remain to be distributed for the benefit of your orators or the other creditors of said firm.

Your orators further represent that after the fraudulent and fictitious increase in the apparent indebtedness of said firm of J. Fernandez & Co., made for the purposes aforesaid, the condition of the business thereof as shown by their books of account on the day their suspension of payments was declared, being April 26, 1900,

9 showed the assets and liabilities of said firm respectively to foot up to the sum of two hundred seventy seven thousand eight hundred fifty eight and 15/100 pesos, provincial money, as shown by a copy of said statement so filed by said firm in the court to which said application for suspension of payments was made, herewith filed as "Exhibit B" and prayed to be taken and considered as a part hereof; that among the assets of said firm as thereby shown appeared goods in stock in the store in Mayaguez, in the branch in Añasco and in the warehouse amounting in value to over seventy-three thousand pesos, provincial money, a large part of which has disappeared and has, as your orators are informed and believe, been removed from the possession and control of said Syndicos and disposed of by the defendants herein fraudulently and without consideration received for the benefit of the creditors.

Your orators further represent that by the terms of said agreement between said defendant J. Fernandez and your orators Jaffé Brothers & Co. the sum due to said orators was to be paid in certain instalments as therein specified, the time of said payments not having yet arrived; but that because of the aforesaid suspension of payments by said firm of J. Fernandez & Co. all of said instalments have under the law become immediately due and payable and the right of your orators Jaffé Brothers & Co. to the immediate enforcement of said agreement has accrued; and that the debt of your orators Hinne & Company has also been long past due as hereinbefore alleged.

To the end, therefore, that the said defendant Jose Fernandez may, if he can, show why your orators should not have the relief hereby prayed, and may upon his corporate oath and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, that is to say:

First. Whether at or about the time he applied for a suspension

of payments for said firm of J. Fernandez & Co. he issued or caused to be issued and delivered evidences of indebtedness signed with the firm name without value or consideration being given thereof;
10 and if so, to what amount the apparent liabilities of said firm were increased thereby.

Second. Whether the pretended statement of the condition of the business of said firm which was filed in the Court which granted the application for said suspension of payments did not show among the assets of said firm merchandise in the warehouse and in the stores at Mayaguez and Añasco amounting in value to more than seventy-three thousand pesos, provincial money; and if so, what has become of said merchandise? What is the value of the merchandise still remaining in the possession of the Syndicos of said firm?

Third. Whether any money has been collected by said Syndicos from the debts due to said firm of J. Fernandez & Co.; and if so, how *how* much?

Fourth. Whether any of the creditors of said firm have been paid all or any part of the amounts due them since said suspension of payments; and if so, how much has been so paid and to whom?

Fifth. Whether the said syndicos now have in their hands any money realized from the sale of the assets of said firm; and if so, how much?

Sixth. Whether any of the property or assets formerly belonging to said firm have been turned over and delivered to the special partners Victor Martinez and Cerecedo Hermanos since the suspension of payments or about that time; and if so, what kind of property and of what value to each, and what was paid by them for the same?

Seventh. Whether any consideration was paid by Demetrio Bolta for the transfer to him of the securities hereinbefore described; and if so, in what from was the same paid, in money, draft, check or order, and what became of said money? If the amount paid was fifty per cent of the face value of said securities, for what reason, were the same sold at a discount?

Eighth. Whether you entered into the agreement with orators Jaffé Brothers & Co. as alleged in this bill, and if so, why you
11 did not carry out that agreement by transferring said securities to them for full value instead of selling the same to said Demetrio Bolta for one half of their value? and that the said defendants Manuel Cerecedo, Enrique Cerecedo, José Cerecedo, Francisco Cerecedo, Victor Martinez, Demetrio Bolta and Alfredo Arnaldo y Sevilla may also answer the premises, but not under oath the benefit whereof is hereby expressly waived by your orators; that your orators Jaffé Brothers & Company may be decreed to be entitled to a specific performance of their said agreement with the defendant firm of J. Fernandez & Company, herewith filed as Exhibit A as aforesaid, and that any amount which may be collected by the Receiver herein prayed to be appointed from the said securities may be paid over to, and applied upon the payment of said indebtedness of, said orators, or that said defendant J. Fernandez, as the active partner and liquidator of said firm, may be decreed to

assign the same to said orators; that the said defendants, and each one of them, may be restrained and enjoined by the order of this honorable court from collecting or appropriating to their own use all or any part of the securities enumerated in the agreement aforesaid; that a Receiver may be appointed by this honorable Court of all and singular the property, choses in action, assets, rights and credits of said partnership of J. Fernandez & Company for the purpose of honestly and fairly administering and closing up the affairs of said partnership and of enforcing the rights and equities of the various creditors thereof, marshalling all its assets and ascertaining the respective liens and priorities existing thereon, and enforcing and decreeing the rights, liens and equities of each and all the creditors thereof as the same may be ascertained and decreed by the court upon the respective interventions or applications of said creditors; and that each and all of the defendants and all other persons may be required forthwith to deliver up to such receiver the possession and control of all and singular the property and assets of said firm as aforesaid, and also all books of account, vouchers and papers
12 in any way relating to the business of said firm; and that said defendants and all other persons may be restrained by the order of this honorable Court from in any way interfering with the possession and control of said receiver over said property; that at such time as may be found just and proper all the remaining assets and property of said firm may be ordered to be sold and the proceeds distributed among those entitled thereto; that your orators Jaffé Brothers & Co. may be allowed to participate pro rata in the general distribution for the balance due them after the application to said debt of the proceeds of the securities aforesaid; that both your orators may be allowed their reasonable costs, expenses and attorneys' fees out of the assets of said firm because of the preservation thereof by these proceedings; and that your orators may have such other and further relief in the premises as equity may require and as may be necessary to fully protect and enforce the rights and equities of your orators and as to your honor may seem meet;

May it please your Honor to grant unto your orators a writ of subpœna to be directed to the said defendants José Fernandez, as active and general partner of the firm of J. Fernandez & Co. and as Liquidator of said firm, Manuel Cerecedo, Enrique Cerecedo, José Cerecedo and Francisco Cerecedo, as partners under the firm name of Cerecedo Hermanos, Victor Martinez, Demetrio Belta and Alfredo Arnaldo y Sevilla, thereby commanding them and each of them at a time certain therein to be named and under a certain penalty therein to be expressed, personally to appear before this honorable Court and then and there full, true and direct answer make to this bill, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And you- orators will ever pray, etc.

PETTINGILL & KEEDY,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
District of Porto Rico:

13 B. M. Delgado de Lemos, being duly sworn, says that he is the agent and representative of the complainants Jaffé Brothers & Co. in the Island of Porto Rico; that he has read the foregoing bill and knows the contents thereof and that the matters and things therein alleged and set forth are true of his own knowledge, except as to such matters as are therein alleged upon information and belief and those matters he believes to be true.

B. M. DELGADO DE LEMOS.

[Seal of U. S. Dist. Court for Porto Rico.]

Sworn to and subscribed before me this 17th day of November, A. D. 1900.

GEO. W. LIEBERTH,
Clerk U. S. District Court of Porto Rico.

EXHIBIT "A" TO BILL.

(Filed November 19, 1900.)

Notarial College of Porto Rico.

District of Mayaguez.

Notarial Office of Licentiate Mr. Alfredo Arnaldo y Sevilla, Mayaguez.

Deed of Agreement.

Executed under Number 66
by
Jaffe Brothers & Company
and
J. Fernandez & Company.

February 13, 1900.

Translation. Number Sixty-six.

In the City of Mayaguez, on the thirteenth of February nineteen hundred, before me, the Licentiate Mr. Alfredo Arnaldo y Sevilla, Notary, residing in said city, of the College of Porto Rico, and before the witnesses to be mentioned, appeared:

On the first part—Mr. John Henry Luis, of age, married, merchant, a resident of Dundee, Scotland,

14 On the second part—Mr. José Fernandez Gomez, of age, unmarried, merchant, and a resident of this City.

Mr. John Henry Luis appears in the name of the mercantile firm established in Dundee, Scotland, Jaffe Brothers & Company, and

proves his representation exhibiting the social deed of October fifth, eighteen hundred and ninety-three, executed by Mr. George Heron, Notary of Dundee, legalized by the Vice-Consul of the United States in said city, and the certificate placed on same deed by Mr. William C. Dickson, Notary of Dundee, on January sixth nineteen hundred, duly legalized by the Consul of the United States of North America in said City; in accordance with the first of said documents, the said Mr. Luis is authorized to take judicial steps for the collection of all sums owed to Messrs. Jaffe Brothers & Company, to compromise; to accept as guarantee of said accounts those which might be offered; to execute all kind of deeds in the name of said firm; to give receipts in their name, for all sums received for them; to cancel mortgages; and also to substitute said power of attorney.

Mr. Fernandez Gomez appears representing the mercantile firm of this city J. Fernandez & Company, as per deed executed on March twenty-third eighteen-hundred and ninety-six, the original of which I have before me, by the ex-Notary of this city Mr. Juan Z. Rodriguez. It appears from this deed that Mr. Fernandez Gomez is an active partner of Mess. J. Fernandez & Company.

I certify that the above corresponds with the deeds above mentioned; also that I am acquainted with both appearing parties, as to their profession and residence; and they, in my judgment, have all the necessary capacity for the execution of this agreement.

Statements.

First. Mess. J. Fernandez & Company confess to owe Mess. Jaffe Brothers & Company, of Dundee, two thousand three hundred and eight pounds sterling, eleven shillings, six pence; which sum they owe them since the thirty-first day of December eighteen hundred and ninety nine.

Second. Mess. Jaffé Brothers & Company agree to postpone the *the* collection of the amount which Mess. J. Fernandez & Company owe them, accumulating on same the interest at six per centum per annum, in the following way:

Six hundred pounds, on the thirtyfirst day of December, nineteen hundred.

Four hundred pounds, on the thirtieth day of June, nineteen hundred and one.

Seven hundred and fifty pounds, on the thirty-first day of December nineteen hundred and one.

Five hundred pounds, on the thirtieth day of June, nineteen hundred and two; and

Three hundred and thirty-one pounds, two shillings, and eleven pence' on the thirty-first day of December, nineteen hundred and two.

Total: Two thousand, five hundred and eighty-one pounds two shillings and eleven pence.

Third. That amongst other property, Mess. J. Fernandez & Company are owners of the following mortgage credits:

1st. One for one thousand nine hundred and eighty-two pesos,

seventeen centavos, against the Estate of Muñoz Portilla, which was transferred to them by Successors of Esmoris, as per deed executed before the ex-Notary of this city, Mr. Juan Z. Rodriguez, on the sixteenth of February eighteen-hundred and ninety-nine; recorded at folios 214 and 217 *turned*, of volume 11 and 2, 67 and 69 turned, of volume 12th of Las Marias, properties Number 26 triplicate: 7th, 5th, 5th, 7th and 6th records.

2nd. Mortgage for two thousand five hundred pesos, on a real estate of Mr. Angel Garcia, as per deed executed before the Notary of San German, Mr. José R. Nazario de Figueroa, on the 16th of January of the current year; recorded at folio 230 turned, of volume 6th of Sabana Grande, property number 347, 2nd record.

3rd. Mortgage for two thousand seven hundred and twenty nine pesos, thirty six centavos, on a landed property of Mr. Claudio Nin y Maturet, as per deed executed before the Notary of this City Mr. Mariano Riera Palmer, on the twenty-sixth of June,
16 eighteen hundred and ninety-nine, which is not recorded at the Registry of Properties.

4th. Mortgage for eight hundred pesos, provincial money, on a real estate of Mess. Lassise Vicens & Company, which mortgage was given by said firm to the mercantile firm of J. Casta é Hijos, as per deed executed before the Notary of this city, Mr. Mariano Riera Palmer, on the sixteenth of September, eighteen hundred and ninety-eight, and transferred to Mess. J. Fernandez & Company per deed executed before said Notary on the twelfth of March, ninety-eight, which is neither recorded at the Registry of Properties.

Furthermore, the Mess. J. Fernandez & Company, are owners of two houses with their lots, situated in the ward of Paris, this City; and Mr. Francisco Tomasini will adjudge to them lands valued in ten thousand nine hundred pesos, provincial money, as per appraisement, which he owes them.

Fourth. In order to guarantee the fulfillment of the obligations stated in the second fact as above, they agree to give voluntary mortgage to their creditors on the real estate and other property described in the previous fact, as follows:

The mortgage of Mr. Claudio Nin shall be transferred as security for two thousand six hundred and twenty-nine pesos, thirty-six centavos, of credit, as principal, and one thousand pesos, of additional credit for costs; the mortgage credit which is to be given becoming due on the date on which the mortgage given is due.

The mortgage of Mr. Angel Garcia, which shall be transferred as security for two thousand pesos, provincial money, for principal credit, shall become due on the due date of the mortgage; and for costs credit, it shall be subject to the payment of the same that burdens the real estate mortgaged.

The mortgage of Mess. Lassise Vicens & Company, shall be transferred as security for eight hundred pesos; there shall be burdened on same the additional credit that burdens the mortgaged real estate transferred as security; and shall become due on the same
17 date on which the mortgage is due.

The two houses and lot in the Ward Paris, shall be mort-

gaged for one thousand two hundred pesos, provincial money; they shall be appraised in two thousand pesos; a credit of five hundred pesos shall be burdened on same for costs, and the mortgage shall become due on the thirty-first day of December, nineteen hundred and one; and finally, the landed property which they shall acquire from Mr. Tomasini, shall be mortgaged for ten thousand nine hundred pesos, appraised in twelve thousand pesos; it shall be liable furthermore for five hundred pesos for costs. The payment shall be effected dividing the amount of the mortgage into four parts; corresponding each part to each of the due dates fixed in the second fact of this deed, excepting the first one.

Fifth. Mess. Jaffe Brothers & Company bind themselves to collect for their acct. the guarantees which is to be given them; and also not to take any action, with a view to collection, against Mess. J. Fernandez & Co., except in so far as whatever may be lacking between said guarantees and the amount due them, as per this agreement.

Sixth. Mess. J. Fernandez & Company are entitled to pay to their creditors, at any time; the amounts due them; deducting interests at the rate of six per centum per annum, up to the due date.

Seventh. Mess. J. Fernandez & Company shall pay to Mess. Jaffe Brothers & Company, the amounts agreed upon, in this city.

Eighth. Whenever the payment of any of the terms is effected, or payments on account for account of the debtors, the creditors shall be bound to execute the mortgage credit which may be agreed to between the former and the attorney in fact of the latter.

Ninth. The expenses of this deeds as also the expenses of those to be executed as per this agreement, shall be for account of Messrs. J. Fernandez & Company.

Tenth. Mr. José Fernandez Gomez and Mr. John Henry Luis, accept this deed in all its parts, in the name of the firms which
18 they represent: binding themselves to the compliance of this agreement; and promising to indemnify themselves of the damages that the non-compliance of the aforesaid clauses might cause them, and

Eleventh. Mess. J. Fernandez & Company bind themselves to insure the houses situated in the Ward of Paris which they have agreed to mortgage, for the same amount mentioned herein for the mortgage.

It was thus executed, in the presence of the witnesses, Mr. Enrique San Millan, and Mr. Federico Gatell, residents of this city, after reading this document to them, notifying them beforehand of their right to read same by themselves which they refused.

I certify to all the above. J. Fernandez & Co.—Jaffe Bros. & Co.—Enrique San Millan—Federico Gatell—Signed—Alfredo Arnaldo—

This copy corresponds with its original, which under number Sixty-six, remains in the current protocol of public documents of this Notarial Office under my charge to which I refer to.

In virtue thereof and at the request of Mr. Benjamin Delgado, Attorney in fact for Mess. Jaffe Brothers & Company, I issue this present copy, which I sign and scroll on five full sheets of paper

taking note of its registry at Mayaguez on November second of the year of its execution.

(Signed) ALFREDO ARNALDO.

There is a Notarial Seal.

EXHIBIT "B" FOR BILL.

(Filed November 19, 1900.)

Condition of Business of J. Fernandez & Co. on April 26, 1900.

Assets.

Furniture	1,504.34	pesos
23 shares in the Lares Railroad	1,100.00	"
Notes and drafts for collection	13,453.29	"
Mortgages owned	11,604.20	"
19 Consignment of coffee to Schumann & Co.	4,866.58	"
Debtors as per blotter	2,002.95	"
Merchandise	51,233.47	"
Ditto in the warehouse	17,142.92	"
Branch house at Añasco	5,273.30	"
Cash on hand	1,004.15	"
Bills receivable, special accounts	394.83	"
Houses and lots	1,492.50	"
Commercial paper from debtors	99,725.53	"
Open accounts with debtors in Island	67,030.09	"
Total	277,858.15	"

Liabilities.

Creditors in Europe	36,932.40	"
Exchange on same	20,574.89	"
Due to the Branch Bank	12,825.00	"
Social Capital	53,064.78	"
Commercial paper payable	44,500.00	"
Bills payable	109,961.08	"
Total	277,858.15	"

Subpœna.

(Issued November 17, 1900.)

THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

JAFFÉ BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al.

The President of the United States of America to the Marshal of the District of Porto Rico, Greeting:

You are hereby commanded to summon Manuel Cerecedo, Enrique Cerecedo, José Cerecedo and Francisco Cerecedo as copartners under the firm name of Cerecedo Hermanos, to be and appear in the District Court of the United States for the District of Porto Rico aforesaid, at Mayaguez, on Monday the 3rd day of December, 1900, to answer a certain bill in chancery filed and exhibited in said court against J. Fernandez and Company, by Victor Fraenkl and John Luis copartners as Jaffé Brothers and Company, and Jobst Hinne and John Doe copartners as Hinne and Company.

Hereof you are not to fail, under penalty of the law thence ensuing. And have you then and there this writ.

Witness, the Honorable William H. Holt, District Judge of the United States, for the District of Porto Rico, this 17th day of November, A. D. 1900, and in the 124th year of the Independence of the United States.

[Seal of the U. S. Dist. Court for Porto Rico.]

Attest:

GEO. W. LIEBERTH,
Clerk U. S. Dist. Court of Porto Rico.

(*Marshal's Return.*)

(Filed November 24th, 1900.)

Form No. 570.

UNITED STATES MARSHAL'S OFFICE,
THE DISTRICT OF PORTO RICO.

I hereby certify and return, that I received the within writ on the 19th day of November, 1900, and personally served the same on the 21st day of November, 1900, on Manuel Cerecedo, José Cerecedo, Francisco Cerecedo and Enrique Cerecedo, as copartners under the firm name of Cerecedo Hermanos, by delivering to and leaving with Enrique Cerecedo an adult person, who is a member of the firm name of Cerecedo Hermanos (Manager). Said defendants named therein, at San Juan, P. R. in said District, an attested copy thereof.

at the place of business of said Cerecedo Hermanos, said defendants herein.

E. S. WILSON,
U. S. Marshal,
21 By JOHN L. MILLER, *Deputy.*

San Juan, P. R., November 21st, 1900.

(*Marshal's Return.*)

(Filed November 24, 1900.)

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I served the annexed Writ on the therein-named Enrique Cerecedo, as a copartner under the firm name of Cerecedo Hermanos, by handing to and leaving a true and correct copy thereof with Enrique Cerecedo, as a copartner under the firm name of Cerecedo Hermanos, personally at San Juan, P. R. in said District on the 21st day of November, A. D. 1900.

E. S. WILSON,
U. S. Marshal,
By JOHN L. MILLER, *Deputy.*

Special Appearance of Herbert E. Smith in Behalf of Defendants.

(Filed December 3, 1900.)

JAFFE BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al.

To the Clerk of said Court:

You will please notice this my special appearance as solicitor for the defendants in the above entitled cause in your office, which special appearance is solely for the purpose of moving the Court for the compliance on the part of the plaintiffs with the Rule of the Court relative to non-residents giving security for costs, and for the purpose of opposing the motion for an Injunction and Receiver.

Yours, etc.,

HERBERT E. SMITH,
Solicitor for Defendants.

Dec. 3rd, 1900.

22 *Journal Entry.*

December 5, 1900.

#6. In Equity.

JAFFE BROS. et al.
vs.
J. FERNANDEZ & Co. et al.

This cause coming on for further hearing upon the application of the complainants for the appointment of a receiver as prayed for in the Bill, arguments of Counsel on behalf of defendants were heard. Whereupon the further hearing on said application was adjourned until Thursday December 6th, 1900.

Order Appointing a Receiver.

(Filed January 14, 1901.)

JAFFE BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al.

Bill for Receiver and Other Relief.

This cause having been heretofore heard, after due notice given upon the application of the complainants for a temporary injunction and the appointment of a Receiver as prayed for in *in* their bill of complaint, and having been fully argued by counsel for the respective parties, and the Court having given mature consideration to the allegations of the pleadings and the certificates and affidavits of the respective parties, submitted at said hearing, and being fully advised in the premises and opinion being filed, and it thereupon appearing to the Court reasonable and proper that the application aforesaid should be granted:

It is hereby ordered and decreed, that Paul Le Hardy of San Juan, P. R., be, and he is hereby appointed the Receiver of this Court of all and singular the property, choses in action, assets, rights and credits of the said firm known as J. Fernandez & Co., including the said property and securities described in the agreement between said complainants Jaffe Brothers & Co. and the defendant
23 Jose Fernandez, which is filed with the bill of complaint herein as Exhibit A., as well as all money and assets of every kind including property real, personal and mixed now held and possessed by said firm or formerly so held and possessed and since fraudulently transferred or conveyed, wherever the same may be situated or found to have and to hold the same as an officer of and under the orders and directions of this Court; and that the said Receiver be, and he is hereby, authorized and directed to take imme-

diate possession of all and singular the property and assets above described and referred to, and to demand possession of the same or any part thereof from any person having the same in his possession or control, to protect, manage and control the same as in his judgment may be for the best interests of the creditors or as may be ordered by this Court, and to employ such persons and make such payments and disbursements for expenses as may be needful and proper in so doing.

It is hereby further ordered, that the said Receiver within ten days file with the Clerk of this Court a proper bond with good and sufficient surety to be approved by said Clerk in the penal sum of Twenty-five Thousand Dollars, conditioned for the faithful discharge of his duties and to account for all the funds coming into his hands according to the order of this Court.

Each and every of the defendants José Fernandez, Manuel Cerecedo, Enrique Cerecedo, José Cerecedo, Francisco Cerecedo, Victor Martinez, Demetrio Bolta and Alfredo Arnaldo y Sevilla, and all other persons having notice hereof, are hereby required and commanded to turn over and deliver to said Receiver, or his duly authorized representative, any and all property, books of account, deeds and other property of whatsoever kind the same may be belonging rightfully to said firm of J. Fernandez & Co. and being or coming into his or their hands, possession or control, including the said property and securities described in the agreement referred to in said bill of complaint; and each and every of the said de-
24 fendants, their agents and employees, are hereby commanded and required to obey and conform to such requests for information and assistance as may be made to them by said Receiver in the discharge of his said duties.

And it is further ordered, that the said defendants above named, their agents and employees, and all other persons be, and they are hereby restrained and enjoined until the further order of the Court, from collecting or appropriating to their own use any of the property or assets of said firm of J. Fernandez & Co. as aforesaid, including the securities described in and covered by the agreement aforesaid and from interfering in any manner whatever with the possession or management of any part of the said property over which a Receiver is hereby appointed.

And it is further ordered, that said Receiver be and he is hereby empowered to collect all debts due and owing to said firm of J. Fernandez & Co., to institute and prosecute such suits as may be necessary for that purpose and for the proper protection of the property and trusts hereby vested in him as well as for the recovery of property and assets fraudulently disposed of, to control the further conduct of suits already existing brought by said firm or in which its name is used, and likewise to defend all such actions as may be brought against him as such Receiver, and generally to manage and dispose of said property and assets for the best interests of the creditors of said partnership, provided that no sale of property amounting to more than Five Hundred Dollars in value shall be made without the order of this Court. The said Receiver is also ordered to file in

this Court within thirty days of his qualification an inventory of the assets coming into his hands. He will report his acts and doings, amounts received and disbursed by him with vouchers therefor as the Court may direct.

It is hereby further ordered, that within 10 days from this date the complainants, or someone in their behalf shall enter into bond to the defendants in the penal sum of 30,000 Dollars, conditioned to pay to the defendants any and all damages suffered by them or either of them by reason of the wrongful or improvident issuance of this order.

Done and ordered at Chambers in San Juan, this 11 day of January, A. D. 1901.

WM. H. HOLT, *Judge.*

Stipulation.

(Filed February 4, 1091.)

JAFFE BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al.

It is hereby stipulated and agreed by and between the attorneys for the respective parties Complainant and Defendant that the Defendants herein may and shall have until the 20th day of February, 1901, for the purpose of demurring to, pleading to, or answering the Bill of Complaint of said Complainants herein.

PETTINGILL & KEEDY,
Solicitors for Complainants.
HERBERT E. SMITH,
Solicitor for Defendants.

San Juan, P. R., Jan'y 31, '01.

Amendment to Bill of Complaint.

(Filed February 23, 1901.)

JAFFÉ BROTHERS & COMPANY et al.
vs.
JOSÉ FERNANDEZ et al.

Bill for Receiver & Relief.

Now come the complainants, by their solicitors Pettingill & Keedy, and as of course in accordance with Equity Rule #28 amend their bill of complaint in the above cause by striking out in the fourth line of the body of the first page thereof the words "John Doe" and inserting in place thereof the words "Herman Wolfram."

PETTINGILL & KEEDY,
Solicitors for Complainants.

26 Order Book Entry, February 23rd, 1901.

(*Order for Decree Pro Confesso.*)

JAFFE BROTHERS & Co. et al.
vs.
JOSÉ FERNANDEZ et al.

Bill for Receiver and Relief.

It appearing that the bill of complaint in this cause was duly filed praying for process against the said defendants named therein, and that thereafter upon complainants' notice of an application for temporary injunction and appointment of a Receiver the defendants duly entered their appearance herein by their solicitor on the third day of December, A. D. 1900; and it further appearing that said defendants have not, nor has either of them, on or before the 4th day of February, A. D. 1901, the same being the last rule day of this court, filed any plea, answer, demurrer or other defence to the complainants' said bill of complaint, although required so to do by the rules and practice of this court; and that such default still continues;

Now, therefore, on motion of Messrs. Pettingill & Keedy solicitors for said complainants, it is hereby ordered that the bill of complaint in this cause be taken as confessed against the said defendants José Fernandez, as general partner and as liquidator of the firm of J. Fernandez & Company, Manuel Cerecedo, Enrique Cerecedo, José Cerecedo and Francisco Cerecedo, as copartners under the firm name of Cerecedo Hermanos, Victor Martinez, Demetrio Bolta and Alfredo Arnaldo y Sevilla, in accordance with law and the rules and practice of this court in such case made and provided; and that complainants have leave to proceed *ex parte*.

Dated at San Juan this 23rd day of February, A. D. 1901.

PETTINGILL & KEEDY,
Solicitors for Complainants.

27 *Final Decree.*

(Filed June 8th, 1901.)

JAFFE BROTHERS & COMPANY et al.
vs.
JOSÉ FERNANDEZ et al.

Bill for Relief.

It appearing to the court that the bill in the above entitled cause was filed in this court on the 19th day of November, A. D. 1900, and that all the defendants named therein afterward, to wit on the 3rd day of December, 1900, duly entered their appearance in said

cause, by their solicitor Herbert E. Smith, and opposed the application of the complainants for the appointment of a Receiver herein, but that no demurrer, plea or answer to said bill of complaint was filed by any of said defendants as required by the rules and practice of this court, and an order taking the said bill pro confesso was duly entered for want of such demurrer, plea or answer on the 25th day of February, A. D. 1901, in the order book, and that no proceedings have been had or taken by said defendants, or any of them, since such order was entered; now, therefore, more than thirty days after entering said order as aforesaid, to wit: on this 8th day of June, A. D. 1901, it is hereby ordered, adjudged and decreed that the equities of said cause are with the complainants; that the said defendants José Fernandez and Manuel Cerecedo, Enrique Cerecedo, José Cerecedo and Francisco Cerecedo, as copartners under the firm name of Cerecedo Hermanos, and Victor Martinez, all the named defendants being members of the commercial firm of J. Fernandez & Company, are indebted to the complainants Victor Fraenkl and John H. Luis, as copartners under the firm name of Jaffe Brothers & Company, in the sum of two thousand three hundred and eight pounds sterling, eleven shillings and sixpence, which is equivalent to *eleven thousand three hundred and twelve* dollars and two
28 cents, American gold, with interest thereon at the rate of six per cent per annum from the 31st day of December A. D. 1899; and that the same defendants above named are further indebted to the complainants Jobst Hinne and Herman Wolfram, as copartners under the firm name of Hinne & Company, in the sum of eight thousand and sixty-eight marks, which is equivalent to *one thousand nine hundred and thirty-six dollars* and thirty cents, American gold, with interest thereon at the said rate of six per cent per annum from the 30th day of June, A. D. 1900.

And it is hereby further ordered, adjudged and decreed that the alleged indebtedness of twenty-seven thousand dollars from the said firm of J. Fernandez & Company to the said firm of Cerecedo Hermanos and the further alleged indebtedness of seventeen thousand five hundred dollars from the same firm of J. Fernandez & Company, to the defendant Victor Martinez be declared fraudulent and fictitious and the same be cancelled and annulled as against the rights of the said complainants; that the alleged transfer and the sale made by the defendant José Fernandez to the defendant Demetrio Bolta of a mortgage from the Sucesion de Muñoz Portilla for the sum of one thousand nine hundred and eighty-two pesos, seventeen centavos, provincial money, a mortgage from Angel Garcia for the sum of twenty-five hundred pesos, provincial money, and a claim against Francisco Taurisini for the sum of ten thousand nine hundred pesos, provincial money, be cancelled and set aside as fraudulent; and the said defendants, and all persons claiming through or under them since the commencement of this suit are hereby enjoined from enforcing the said securities or collecting or attempting to collect the same.

And it is further ordered, adjudged and decreed that the defendants herein named as composing the said commercial firm of J.

Fernandez & Company do pay to the said respective complainants within the space of sixty days the said several amounts so adjudged to be due them respectively as aforesaid, and that in default
29 of such payment the said complainants have execution against the said defendants for such respective amounts.

Done and ordered in open court at Mayaguez this 8th day of June, A. D. 1901.

WM. H. HOLT, *Judge.*

Execution.

(Issued January 31st, 1902.)

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

The President of the United States of America to the Marshal of the District of Porto Rico, Greeting:

You are hereby commanded, that of the goods and chattels, and for want thereof, then of the lands and tenements of Jose Fernandez, and Manuel Cerecedo, Enrique Cerecedo, José Cerecedo, and Francisco Cerecedo, as copartners under the firm name of Cerecedo Hermanos, and Victor Martinez, all said defendants being members of the commercial firm of J. Fernandez and Company in your District, you cause to be made the sum of eleven thousand three hundred and twelve dollars and two cents ($11,312.02), in U. S. currency, and interest at 6% from December 31, 1899, damages, and forty dollars and thirty cents ($40.30) costs of suit, which, by the judgment of the District Court of the United States for Porto Rico at the June Term thereof, in the year 1901, Victor Fraenkl and John H. Luis as copartners under the firm name of Jaffe Brothers and Company recovered against the said José Fernandez and Manuel Cerecedo, Enr-que Cerecedo, José Cerecedo, and Francisco Cerecedo as Copartners under the firm name of Cerecedo Hermanos, and Victor Martinez, all said defendants being members of the Commercial Firm of J. Fernandez and Company with interest thereon from the 31st of December, 1899 until paid, together with the further sum of — costs of increase on said judgment; and also the
30 costs that may accrue on this writ. *crue on this writ.*

And have you the said moneys in the said District court, before the Judge thereof, in said District, within sixty days from the date of this writ, to be paid to the persons entitled to receive the same. And have you then and there this writ.

Witness, the Honorable Wm. H. Holt, Judge of the District Court of the United States for Porto Rico this the 31st day of January, A. D. 1902 and of the Independence of the United States of America the 126th.

Attest:

[Seal of the Dist. Court of the United States for Porto Rico.]

RICARDO NADAL, *Clerk.*

(Endorsed on margin:) June 22, 1903. Returned unexecuted by order of Court. Filed Clerk's Office, United States District Court, July 1st, 1903. Ricardo Nadal, Clerk of the Court.

Execution.

(Issued January 31st, 1902.)

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

The President of the United States — America to the Marshal of the District of Porto Rico, Greeting:

You are hereby commanded, that of the goods and chattels, and for want thereof, then of the lands and tenements of Jose Fernandez and Manuel Cerecedo, Enrique Cerecedo, Jose Cerecedo, and Francisco Cerecedo, as co-partners under the firm name of Cerecedo Hermanos, and Victor Martinez, all said defendants being members of the Commercial firm of J. Fernandez and Company in your District, you cause to be made the sum of One Thousand nine hundred and thirty six dollars and thirty cents ($1,936.30), with interest at 6% from June 30, 1901, damages, and thirteen dollars and twenty five cents ($13.25) costs of suit, which, by the judgment of the
31 District Court of the United States for Porto Rico at the June Term thereof, in the year 1901, Jobst Hinne and Herman Wolfrom as copartners under the firm name of Hinne and Company recovered against the said José Fernandez and Manuel Cerecedo, Enrique Cerecedo, José Cerecedo, and Francisco Cerecedo, as co-partners under the firm name of Cerecedo Hermanos, and Victor Martinez, all said defendants being members of the Commercial firm of J. Fernandez and Company, with interest thereon from the 30th day of June, A. D. 1901, until paid, together with the further sum of — costs of increase on said judgment; and also the costs that may accrue on this writ.

And have you the said moneys in the said District Court, before the Judge thereof, in said District within sixty days from the date of this writ, to be paid to the persons entitled to receive the same. And have you then and there this writ.

Witness, the Honorable Wm. H. Holt, Judge of the District Court of the United States for Porto Rico and the seal thereof, this 31st day of January, 1902, and of the Independence of the United States of America the 126th.

Attest:

[Seal of the District Court of the United States for Porto Rico.]

RICARDO NADAL, *Clerk.*

(Endorsed on back of execution:) June 22, 1903. Returned unexecuted by order of Court. Filed Clerk's Office, United States District Court. July 1st, 1903. Ricardo Nadal, Clerk of the Court.

Petition for Leave to File Bill of Review.

(Filed Feb. 6th, 1902.)

MANUEL CERECEDO, ENRIQUE CERECEDO, JOSE CERECEDO, and FRANCISCO CERECEDO, Co-partners under the Firm Name of Cerecedo Hermanos,

vs.

J. FERNANDEZ & Co. and VICTOR FRAENKL & JOHN LUIS, Co-partners Doing Business under the Firm Name of Jaffe Brothers & Co., and Jobst Hinne and Hermann Wolfram, Partners under the Firm Name of Hinne and Co.

32 *Petition of Complainants Above Named for Leave to File a Bill of Review.*

To the Honorable Judge of the District Court of the United States for Porto Rico:

Now come your petitioners, complainants above named and present to your Honor their Bill of Review to review and set aside the decree of this court rendered pro confesso herein in Equity cause No. 6 at Mayaguez June 8th 1901 in the cause wherein the said Jaffee Brothers & Co. and the said Hinne Brothers Company were complainants and your petitioners and J. Fernandez and Company were defendants, for the following reasons to wit:

That the said decree is erroneous and improper upon the face of the record in said cause and was not proper to have been given for errors of law apparent upon the said record, and for the reason as appears by the Bill of Review herewith tendered to your Honor by Petitioners and which they pray, for this purpose, may be considered a part of this petition, your petitioners have learned since the said decree that the sums claimed by said complainants to be due in the said cause, have been fully paid to said Complainants in said suit by the defendant therein J. Fernandez and Company and that your petitioners are entitled to the benefit thereof; said information has come to the knowledge of petitioners since said decree and could not have been sooner obtained by the exercise of reasonable diligence and said information would be and is a meritorious defense for petitioners in said suit and petitioners say that as to the facts concerning the appearance of H. E. Smith as Attorney in said cause, all of the same are true, as well, as all other and singular matters and facts in said Bill of Review set forth.

Franco. Cerecedo, in behalf of petitioners says that the facts set forth above are true according to the best of his knowledge and belief.

FRANCO. CERECEDO.

33 Subscribed and sworn to before me this 6th day of Feb., 1902.

RICARDO NADAL,
Clerk U. S. District Court of Porto Rico.

Opinion.

(Filed June 22, 1903.)

CERECEDO HERMANOS
vs.
JAFFE BROS. & Co. et al.

This is a Petition for leave to file a Bill of Review, which is also tendered. The decree asked to be set aside was entered June 8th, 1901. This petition was presented February 6th, 1902. Objection is made that it comes too late. It is claimed that the Act of Congress of March 3rd, 1891, relative to the United States Court of Appeals, applies to it. The limitation for appeal, and which, by analogy, has been applied in equity to the time for filing bills of review, applicable, however, is the two years provided in Section 1008 of the United States Revised Statutes.

Clark vs. Killian, 103 U. S. Reports, 756.
Allen vs. S. P. R. Co., 173 U. S. Reports, 479.

The decree is assailed for alleged error of law apparent upon the record, and also upon the ground of newly discovered evidence of payment of the indebtedness for which judgment was rendered and which could not, by diligence, have been sooner discovered. The decree was a pro confesso one. The original Bill was filed November 19th, 1900, by Jaffe Brothers & Company and Hinne Brothers and Company, as Complainants, against Jose Fernandez & Company, and Cerecedo Hermanos and others, as Defendants. It avers, in substance, that Fernandez & Co. of which firm Cerecedo Brothers were special partners up to the time when Fernandez & Com-
34 pany suspended payment, were indebted to the Complainants in certain sums set forth in the Bill; that fraudulently and to obtain time the last named firm agreed with Jaffe Brothers & Company to transfer to them certain securities upon third parties for their debt, but thereafter proposed to turn them over in actual payment pro tanto, but when the agent of Jaffe Brothers & Company obtained authority to agree to this, said firm applied for suspension of payments; that to get this they issued false evidences of indebtedness to Cerecedo Brothers and others; that after the suspension of payments Fernandez, as Liquidator, fraudulently transferred the securities Complainants Jaffe Bros. & Co. were to have to a third party without consideration and for half of their value; Cerecedo Brothers being in fact the real purchasers; that Fernandez, after the suspension of payments, turned over to Cerecedo Brothers a large amount of property, the amount being unknown to Complainants, and disposed of a large part of the assets fraudulently. Interrogatories were propounded in the Bill to Fernandez. The relief sought was a specific performance of the agreement with Fernandez as to the securities; that a receiver be appointed, and the assets of Fernandez & Company be marshaled; that Fernandez & Company be enjoined from collecting said securities or interfering with the com-

pany's assets; that they be delivered to the receiver, the liens be ascertained, the property sold and distributed among the creditors, Jaffe Brothers & Company being allowed to participate in the distribution, said securities being first applied on their debt. The Receiver was appointed on January 14, 1901, but never qualified. An attorney appeared for the defendants, but the Bill for Review avers that he did so for Fernandez & Company and not for Cerecedo Hermanos, and was not authorized to do so for Cerecedo Hermanos. No defense was, however, presented. The final decree adjudged not only Fernandez but Cerecedo Hermanos indebted to Jaffe Brothers & Company in the sum of $11342.62, with interest from December 31st 1899, and to Hinney & Company in the sum of $1933.30, with interest from June 30, 1900, and that in default of payment
35 execution might issue therefor. It also cancelled certain indebtedness as fraudulent of Fernandez & Co. to Cerecedo Brothers, and annulled certain transfers to other parties.

The alleged payment of the indebtedness is confined to Jaffe Brothers and Company. There is no claim of *of* payment — Hinney & Co. The alleged payment of Jaffe Brothers & Company was made by the payment of certain moneys and the taking of certain transfers of real-estate through an alleged agent. It is claimed upon the one side the person was not such agent and had no authority to make a settlement. This is denied.

The matter should be investigated, or an injustice may be done. It is urged as one ground for review that the Court had no jurisdiction to render the decree. All the complainants, however, were aliens. It is urged that the Bill for Review should not be entertained until the payment of the judgment, which is for money. Generally, one asking to file a bill for review must show performance of the decree. The reason is that opportunity for abuse by delay should not be afforded to parties by such bills. But why require payment if it be true that payment has already been made? It is true this would only apply in this case to Jaffe Brothers & Company, but whether the Court will require compliance with a decree before entering a bill for review depends upon the circumstances of the case. It is an administrative and not a jurisdictional rule.

Davis vs. Spiden, 104 U. S. Reports, 84.

The serious question in the case is, did the averments of the Bill authorize the money decree?

Cerecedo Brothers were but special or limited partners. It is urged in opposition to the review that they were liable *de son tort* in wrongfully applying property to their use which, in equity, belonged to the creditors; that the assets of Fernandez & Company were a trust fund and having wrongfully appropriated some of them they are liable by way of a personal judgment for the indebtedness to complainants.

36 The original Bill, however, sought a settlement of the partnership and the marshaling of all the assets of Fernandez & Company for all of its creditors. This was the basis of the action. Jaffe Brothers & Company and Hinne & Company claim no relief separate from the other creditors, save Jaffe Brothers & Company

claim the benefit of the securities which Fernandez had agreed to transfer to them. The bill did not proceed upon the idea of a money judgment in favor of Jaffe Brothers & Company and Hinne & Company against Cerecedo Brothers. It did not set forth specifically the value of any goods transferred to Cerecedo Brothers by Fernandez & Company. It failed to show in what sum, if any, they should be made liable, even to all the creditors. No answer was filed and no proof was heard. The averments were not definite enough upon which to base such a decree as the one rendered.

Cent. R. R. Co.—Cent. Trust Co., 123 U. S. Reports, 83.

If the averments of the Bill are distinct and positive they are to be taken as true without proof after a pro confesso order; but if so vague that a precise decree cannot be rendered, evidence should be produced. Equity Rule 18 provides that the matter of a Bill may be taken pro confesso and by decree if this can be done without answer and be proper. Such a decree however should conform to and not go beyond what is proper upon the averments of the Bill.

Thomspon vs. Wooster, 114 U. S. Reports, 104.

It is said that the prayer for general relief authorized the judgment; but relief must be agreeable to the Bill. Such a state of case is presented that the petitioners should be allowed to file their Bill for Review, appear, open the decree and make defense; otherwise an injustice may be done. This being allowed, however, Jaffe Brothers & Company and Hinne & Company should be protected. To this end the Complainants in the Bill for Review are required to pay all costs up to this time and to execute within ten days
37 a bond with good security to be approved by the Clerk of this Court, in the sum of fifteen thousand dollars to Jaffe Brothers & Company and Hinne & Company, conditioned to perform any judgment that may finally be rendered against them. In default of their doing all of this, the Bill for Review will not be further entertained.

It appearing that execution has issued upon said decree, it is ordered to be returned upon the execution of said bond.

In the event the Complainants in the Bill of Review comply herewith, all parties are given until October 12th, 1903, to demur, plead, or answer in these causes, which are hereby consolidated and ordered to be tried together.

WM. H. HOLT, *Judge*.

Bill for Review.

(Tendered February 6, 1902.)

MANUEL CERECEDO, ENRIQUE CERECEDO, JOSE CERECEDO & FRANCISCO Cerecedo, Copartners, Doing Business under the Firm Name of Cerecedo Hermanos,

vs.

J. FERNANDEZ & CO. and VICTOR FRAENKL & JOHN LUIS, Copartners, Doing Business under the Firm Name of Jaffe Bros. & Co., and Jobst Hinne & Herman Wolfram, Copartners, Doing business under the Firm Name *Name* of Hinne & Company.

Bill of Review.

To the Honorable Judge of the District Court of the United States for Porto Rico:

Manuel Cerecedo, Enrique Cerecedo, Jose Cerecedo and Francisco Cerecedo, all subjects of the King of Spain and resident in Porto Rico, and composing the copartnership of Cerecedo Hermanos, bring this, their bill against the above named defendants, J. Fernandez & Company, a society organized under the laws of Porto Rico and doing business therein, composed of J. Fernandez, V. Martinez and others; and the firm of Jaffe Bros. & Company, composed of Victor Fraenkl and John Luis, and the firm of
38 Hinne & Company, composed of Jobst Hinne and Herman Wolfran, all being subjects of the King of Great Britain and Ireland; and complainants show unto your Honor as follows:

That on or about the 17th day of November, 1900, defendants above named, except J. Fernandez & Company, exhibited their bill in this honorable Court against defendants herein, J. Fernandez & Company, setting forth as members of the said firm of J. Fernandez & Company and defendants in said suit, J. Fernandez, V. Martinez, and your orators, and in said bill of complaint the said defendants set forth that the said J. Fernandez & Company was at that time indebted to them in the sum of £2308.-11.-6 and 8030 Marks (Ger. Cy.) respectively, and in said bill the complainants therein alleged that the said Fernandez & Company had before that time presented themselves in suspension of payment in accordance with the laws of Porto Rico, and that a period of time had been granted by the courts of Porto Rico for the payment of all the debts of said J. Fernandez & Company, which said period of time has not yet elapsed as your orators aver.

Your orators further allege that in said bill it was stated that your orators, as members of the said firm of J. Fernandez & Company, had received certain transfers and payments in fraud of the complainants in said bill and other creditors of J. Fernandez & Company; and your orators aver that other immaterial and irrelevant allegations were set forth in the said bill of complaint which were not material to be set forth in this bill of review.

Your orators aver that by the prayer of said bill of complaint this Honorable Court was asked to declare as fraudulent the transfer and payments described in said bill of complaint, as alleged to have been made to your orators, and also that the said suspension of payments, as decreed before that time by competent Insular Courts of Porto Rico, should be as to the complainants in said bill annulled and for naught held.

39 But your orators aver that there is not in the said bill of complaint any prayer for the recovery of any specific sum of money, or of any other amount determined or undetermined, against your orators; but your orators aver that the prayer of said bill is confined and limited solely and exclusively to the relief herein before in this bill set forth, and that it did not either expressly or by implication pray for the recovery of any sum of money against your orators.

Your orators aver that, though they were served with a subpœna in said cause notifying them to appear therein, that they were advised and informed by the said J. Fernandez who was the principal member of the said firm of J. Fernandez & Company that he had engaged counsel for the defense of the said firm in said suit, and that the attorney appointed for that purpose was Mr. H. E. Smith; and your orators were informed by the said J. Fernandez & Company and by the said H. E. Smith that the latter would appear for the said company of J. Fernandez & Company, and in as much as your orators were only silent partners of the said firm, as set forth in the bill of complaint filed in said cause, no special defense was necessary upon their part by them.

Your orators aver that acting under these representations and in this belief they did not employ or retain the said H. E. Smith, or any other attorney, to represent them especially in the said cause, and that if the said H. E. Smith undertook to appear for or to represent them therein he did so without their authority or consent. But your orators aver that, reposing confidence in the representations of the said J. Fernandez, and believing that the said H. E. Smith represented as Solicitor the firm of J. Fernandez & Company in its capacity as a copartnership, and that they, the said J. Fernandez and the said H. E. Smith would make all proper defenses in the said cause, and your orator believing that they were only formal parties to the said suit, they did not retain counsel or appear in the said suit.

40 Your orators aver that on the 31st day of January, 1901, no demurrer, plea, answer, or other pleading having been filed in said cause by J. Fernandez & Company, or by the said H. E. Smith, the Solicitor thereof, although your orators believed and expected that such steps would be taken as to secure a proper defense to such action, an order was entered taking said bill of complaint pro confesso; and thereafter, on the 8th day of June, 1901, and without any notice thereof having been given to or received by your orators, a final decree was entered in the said cause without any proofs whatsoever as to the matters and facts therein contained and set forth in the said bill of complaint, although by the rules of

chancery and of the Supreme Court of the United States the said bill of complaint should not have been proceeded with ex parte, and without an answer, or proof and the said decree therein entered was improper.

Your orators aver that by the terms and provisions of the said decree certain transfers made to your orators theretofore by J. Fernandez & Company were set aside and for naught held and the said J. Fernandez & Company were ordered and decreed to pay the amounts alleged to be due in the said bill of complaint as hereinbefore set forth.

Your orators further show unto your Honor that the said decree has been duly signed and enrolled, but that the same, as your orators insist, is erroneous, and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, in as much as *it* appears upon the face of the said bill of complaint the following facts and circumstances:

1st. That this Court did not have jurisdiction of said cause for the reason that parties plaintiff only were foreigners, and no other or sufficient ground is set forth to give this Court jurisdiction of the said cause.

2nd. Because the allegations of the said bill and the prayer of relief therein did not justify a decree against your orators for the payment of the said sums of money found to be due in said decree in favor of the defendants in said cause.

41 3rd. Because by the laws of Porto Rico, your orators were not responsible for the said sums of money and no showing is made in said bill establishing their responsibility therefor in law or in equity and no proof was made showing that they are liable for any sums as special partners of J. Fernandez and Co.

4th. Because no recourse could be had against your orators as individual members of said firm of J. Fernandez & Company until it appeared that the partnership assets were insufficient to pay any demand of complainants in said cause.

5th. Because it was erroneous and improper to have entered up a final decree in said cause ex parte upon the face of said bill, without proof to establish the allegations thereof, said bill upon its face requiring discovery of defendants as to certain matters of fact propounded therein by way of interrogatories which were essential and necessary to the relief therein sought.

6th. Because it was erroneous and improper to nullify and set aside in such manner and upon the allegations of said bill the suspension of payment before that time decreed by judgment of a competent Court having jurisdiction of the cause and parties.

7th. Because there was no equity in the said bill and complainants were not entitled to the relief prayed for therein, much less to a decree of a payment of money against your orators.

8th. Because your orators were not represented in said cause by counsel and because they were prejudiced by the action of the said J. Fernandez and the said H. E. Smith, and they were the victims of a mistake as to their rights and obligations in the said suit and were unconscious of and without knowledge of the purpose to obtain

a judgment against them personally or to subject them to any or other further liability beyond that to which they were by the laws of Porto Rico subjected.

9th. Because of the surprise of your orators in not being advised of the said final decree in time to have protected themselves by making a proper defense or opposition thereto.

42 10th. Because upon the record complainants did not show their right to recover beyond the securities transfer-ed to them as appears set forth in Exhibit "A" filed with Bill and made part thereof.

And no proof having been made of the allegations of the said bill of complaint, no decree ought to have been made or grounded thereon but the said bill ought to have been dismissed for the reason aforesaid, and for all of which errors and imperfections in the said decree appearing upon the face of the record in said cause your orators have brought this their bill of review to be relieved in the premises. And your orators aver that the said sums of money so sought to be recovered against them have been before this paid to J. Fernandez & Co. to the complainants in said cause to and through their representative and duly constituted attorney in fact Benjamin Delgado de Lemos, who received the said payment and certain properties in lieu thereof for and in behalf of the said complainants, and your orators aver that this information has come to their knowledge since the said decree and could not have been obtained before by exercise of diligence.

And your orators aver that they are not in law or equity bound to the payment of the said sums of money so sought to be recovered against them because the same, if it should appear that they are not paid or if due and owing must be collected of and from the said J. Fernandez & Company as a copartnership or society.

But your orators aver that notwithstanding this defendants herein, except J. Fernandez & Company, are seeking to collect the said sums of money by the said decree above described adjudged in favor of the complainants in the said cause, against your orators and are enforcing an execution against them under said decree and in pursuance thereof the Marshal has taken possession of the store in which your orators were conducting a large business to the irreparable damage of your orators.

To the end, therefore, that the said decree may be reviewed, reversed and set aside, may it please your Honor to grant unto

43 your orators a reversal and setting aside of said decree and that they be allowed, under the orders of this Court to plead in said cause, and to set up their defense which they aver to be meritorious, and made only for the purpose of equity and in fair dealing, because they do not owe, nor are they liable for the sums of money sought to be recovered of and against them; and meanwhile your orators pray that a writ of injunction issue out of this Court enjoining the said parties complainant, in said cause, and that an order be directed to the Marshal of this Court prohibiting him, from levying any execution under and by virtue of said decree as aforesaid against your orators until the further orders of this Court; and your orators aver their willingness to give such bond as may be in reason and jus-

tice fixed by this Court for the protection of the complainants in said cause pending the litigation and abiding the result thereof; and your orators aver their willingness to pay all costs which may have accrued therein to date.

May it please this honorable Court to issue its writ of subpœna directed to the said J. Fernandez & Company, Victor Fraenkl and John Luis, copartners doing business under the firm name of Jaffe Brothers & Company, and Jobst Hinne and Herman Wolfram, copartners doing business under the firm name of Hinne & Company, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable Court and then and there full, true direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable in equity; and that your orators may have such further or other relief in the premises as the nature of the circumstances of the case may require. And your orators will ever pray.

F. H. DEXTER AND
JOSE HERNANDEZ,
Solicitors.

Enrique Cerecedo being duly sworn, upon his oath says
44 that the facts set forth in the foregoing bill are true, according to the best of his knowledge and belief.

CERECEDO HERMANOS & CO.,
By ENRIQUE CERECEDO.

Subscribed and sworn to before me this 5th day of February, 1902.

[Notarial Seal of Santiago R. Palmer.]

S. R. PALMER,
Notary Public.

Bond of Cerecedo Hermanos in Compliance with Order of June 19th Permitting Bill of Review to be Filed and Opening Decree upon Original Bill.

(Filed June 22, 1903.)

CERECEDO HERMANOS
vs.
JAFFE BROTHERS & Co. et al.

Bill for Review.

Consolidated with

JAFFE BROTHERS AND Co. et al.
vs.
J. FERNANDEZ AND COMPANY.

Original Bill.

Know all men by these presents that we Cerecedo Hermanos & Co., a partnership composed of Manuel Cerecedo, Enrique Cerecedo,

José Cerecedo, and Francisco Cerecedo as principals and Santiago R. Palmer and Manuel Argueso, as sureties acknowledge ourselves jointly and severally bound unto Jaffe Brothers and Company and to Hinne and Company in the sum of Fifteen Thousand Dollars which sum we bind ourselves, our successors, executors, and administrators to pay to the said Jaffe Brothers and Company and Hinne and Company, their successors, administrators, executors and assigns in accordance with the conditions following, to wit:

45 Whereas the above named principals have by the order of this Court of June nineteenth 1903 been permitted to file their bill for review of the decree entered in this court on the eighth day of June, 1901, in Equity cause No. six of the Mayaguez docket in which cause Jaffe Brothers and Company et al. were complainants and José Fernandez and Company et al. were defendants, and

Whereas by the said order of the 19th of June, 1903, aforesaid the principals herein are permitted to appear in said suit or cause last named and to make their defense herein, for which purpose the said decree in said cause of June eighth, 1901, is opened, and the execution heretofore issued and served in said cause upon property of the said principals is ordered to be returned into court and no further action taken thereon upon the giving of this bond,

Now, therefore, if the said Cerecedo Hermanos & Co. as principals, or the said Santiago R. Palmer or Manuel Argueso as sureties, or either of them shall pay to the said Jaffe Brothers and Company or to the said Hinne and Company such sums of money not in excess of Fifteen Thousand Dollars which may be awarded to the said Jaffe Brothers and Company or to the said Hinne and Company or to either of them finally in the said cause or suit of Jaffe Brothers and Company and Hinne and Company against José Fernandez, Equity cause No. 6 (Mayaguez) and which has been opened for the purposes of review as in said order of June 19th, 1903, provided, then this obligation shall be null and void; otherwise in full force and effect.

Witness our hands and seals in the City of San Juan Porto Rico this 22nd day of June, 1903.

CERECEDO HERMANOS & CO., [SEAL.]
Por MANUEL CERECEDO.
S. R. PALMER. [SEAL.]
M. ARGUESO. [SEAL.]

Approved this 22nd day of June, 1903.

[Seal of the Dist. Court of the United States for Porto Rico.]

RICARDO NADAL, *Clerk.*

46 UNITED STATES OF AMERICA.
District of Porto Rico, ss:

Santiago R. Palmer and Manuel Argueso being severally sworn upon their respective oaths say that they are the owners of visible

property in Porto Rico subject to execution and over and above all legal exemptions to the extent of fifteen thousand dollars.

S. R. PALMER.
M. ARGUESO.

Subscribed and sworn to before me this 22nd day of June, 1903.

[Seal of the District Court of the United States for Porto Rico.]

RICARDO NADAL, *Clerk.*

Demurrer to Bill of Review.

(Filed October 13, 1903.)

CERECEDO BROTHERS
vs.
JAFFE BROTHERS & Co. et al.

Bill of Review.

The joint and several demurrer of Victor Fraenkl and John Luis, as partners under the name of Jaffe Brothers & Co., and Jobst Hinne and Herman Wolfram, as partners under the name of Hinne & Co., defendants, to the bill of review of Cerecedo Brothers, complainants therein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of review contained to be true in such manner and form as the same are therein set forth and alleged, demur to said bill of review and for causes of demurrer show:

47 First, that said complainants in and by said bill of review have not made or stated such a case as entitles them to the relief prayed for in said bill, or to any relief, as against these defendants.

Second, that said bill of review shows upon its face that the failure of said complainants to employ counsel to protect their alleged rights resulted from their own negligence and not from any fault of these defendants.

Third, that said bill of review wholly fails to show that the final decree, entered against them in the suit in which these defendants were complainants, was not in all respects warranted by the allegations and prayer of the original bill of these defendants.

Fourth, that no one of the ten specific grounds, alleged in their bill to warrant the review of said final decree, is sufficient in equity to warrant the granting of the relief prayed in their said bill of review, or any relief, as against these defendants. And

Fifth, as a separate ground of demurrer on behalf of said defendants Hinne & Co., that said bill of review contains no allegation affecting the rights of said defendants under said decree or warranting the filing or prosecution of the same as against them.

Wherefore, and for divers other good reasons of demurrer, a
pearing on the face of said bill of review, these defendants dem
thereto and pray the judgment of this honorable court whether th
shall be compelled to make other or further answer to said bill
review, and they humbly pray that said bill of review may be d
missed and themselves hence discharged with their costs in th
behalf most wrongfully sustained.

N. B. K. PETTINGILL,
Solicitor for said Defendants.

48 I hereby certify that the foregoing demurrer is in m
opinion well founded in point of law.

N. B. K. PETTINGILL,
Counsel as Aforesaid.

UNITED STATES OF AMERICA,
District of Porto Rico:

N. B. K. Pettingill, being duly sworn, says that he is the solicit
for the defendants hereinbefore named, that said defendants Ja
Brothers & Co. are residents and have their place of business
Scotland; that the defendants Hinne & Co. are residents of and ha
their place of business in Germany; that neither of said defenda
firms have any general representative in Porto Rico; and that sa
demurrer is not interposed for delay.

N. B. K. PETTINGILL.

Sworn and subscribed before me this — day of October, 1903.

49 *Plea to the Jurisdiction.*

(Filed October 13, 1903.)

JAFFÉ BROTHERS & COMPANY et al.
vs.
J. FERNANDEZ & Co. et al.

Now come the defendants therein in accordance with the order
this Court entered herein on the 20th day of June 1903 by consen
of Counsel file this plea of the jurisdiction and say:

This Court has not now nor did it have at the time of the inst
tution of this action or the filing of the original bill of complai
herein any jurisdiction of this action for the reason that it appea
from the said bill of complaint that all of the parties complainan
were and are foreigners and that all of the parties defendants we
and are citizens of Porto Rico and no party defendant is or was
citizen of the United States or of any State thereof, wherefore d
fendants pray that the original bill herein and this cause be di
missed and that they be discharged hence with all their costs in th
behalf expended.

DEXTER & HORD,
Solicitors for Defendants.

No objection to date of filing.
N. B. K. P.

50 *Journal Entry.*

(October 14, 1903.)

147.

CERECEDO BROTHERS
vs.
JAFFE BROTHERS & Co. et al.

Now come the complainants herein by their solicitors, Dexter and Hord, and tender an amended bill for review and move to file the same and there being no objection thereto the same is allowed to be filed.

Amended Bill for Review.

(Filed October 14, 1903.)

MANUEL CERECEDO, ENRIQUE CERECEDO, JOSÉ CERECEDO, and Francisco Cerecedo, Co-partners, Doing Business under the Firm Name of Cerecedo Hermanos,

vs.

J. FERNANDEZ & Co. and VICTOR FRAENKL and JOHN LUIS, Co-partners, Doing Business under the Firm Name of Jaffe Bros. & Co., and Jobst Hinne and Herman Wol-Fram, Co-partners, Doing Business under the Firm Name of Hinne & Company.

Bill for Review.

To the Honorable Judge of the District Court of the United States for Porto Rico:

Manuel Cerecedo, Enrique Cerecedo, José Cerecedo, and Francisco Cerecedo, resident in Porto Rico, and composing the co-partnership of Cerecedo Hermanos, bring this, their bill against the
50½ above named defendants, J. Fernandez & Company, a society organized under the laws of Spain and doing business therein, composed of J. Fernandez, V. Martinez and others; and the firm of Jaffe Bros. & Company, composed of Victor Fraenkl and John Luis, subjects of the King of Great Britain, and the firm of Hinne & Company, composed of Jobst Hinne and Herman Wolfram, subjects of the Emperor of Germany.

And complainants show unto your Honor as follows:

That on or about the 17th day of November, 1900, defendants above named, except J. Fernandez & Company, exhibited their bill in this honorable Court against defendants herein, J. Fernandez & Company, setting forth that said firm of J. Fernandez & Company, composed of J. Fernandez, V. Martinez and your orators, was at that time indebted to defendants Jaffe Bros. & Co. in the sum of £2308. 11s-6d Sterling, and to Hinne & Company, in the sum of 8060 Marks (German Currency), respectively; and in said bill the com-

plainants therein alleged that the said Fernandez & Company had before that time presented themselves in suspension of payment in accordance with the laws of Porto Rico, and that a period of time had been granted by the courts of Porto Rico for the payment of all the debts of said J. Fernandez & Company, which said period of time had not yet elapsed, as your orators aver.

But your orators aver that on July 12th, 1900, by decree of the District Court or Court of "Primera Instancia" of Mayaguez, Porto Rico, in the last above described proceedings, in which the defendants herein, Jaffe Bros. & Company and Hinne & Company were parties and appeared therein, and in which they had been duly notified in accordance with law, a final decree and judgment of the said Court was entered, approving the "convenio" or composition entered into between the said Fernandez & Company and their creditors, including the said defendants herein Jaffe Bros. & Co. and Hinne & Co., and by the terms and conditions of said final decree the payment of all the debts of the said J. Fernandez & Company,
51 including those of the said defendants herein, Jaffe Bros & Co. and Hinne & Co., was postponed and extended for a period of three years, in accordance with law.

Your orators aver that at the time of the institution of this suit the said decree of the said Court was in full force and effect, and had been in no wise appealed from, abrogated or annulled. And your orators further aver that it does not appear from the original bill or any proceedings thereunder, nor is it a fact, that at any time the said defendants herein, complainants in the original bill, Jaffe Bros. & Co. and Hinne & Company had, nor have they to this date, established their alleged claim against the said firm of J. Fernandez & Company or against your orators herein upon any action or judgment at law.

Your orators further allege that in said bill it was stated that your orators, as members of the said firm of J. Fernandez & Company had received certain transfers and payments in fraud of the complainants in said bill and other creditors of J. Fernandez & Company; and your orators aver that other immaterial and irrelevant allegations were set forth in the said bill of complaint which are not material to be set forth in this bill for review.

But your orators aver that in truth and in fact they had fully paid the subscription which they had made to the stock of the said J. Fernandez & Company, amounting to fifteen thousand dollars, and that all the times mentioned in the said original bill of complaint the amount of stock subscribed for by your orators as special partners to the extent aforesaid was entirely and fully paid for.

And your orators further aver that thereafter and prior to all the transactions set forth in the original bill of complaint herein the said firm of J. Fernandez & Company had become indebted to your orators, the latter in their personal capacity and not as such special partners to a large amount of money, amounting to about
52 twenty thousand dollars, as appears by the books of your orators, for goods sold, drafts accepted and for various accounts before that time had.

Your orators aver that by the prayer of said bill of complaint this honorable Court was asked to declare as fraudulent the transfer and payments described in said bill of complaint, as alleged to have been made to your orators, and also that the said suspension of payments, as decreed before that time by competent Insular Courts of Porto Rico, should be as to the complainants in said bill annulled and for naught held.

But your orators aver that there is and was not in the said bill of complaint any prayer for the recovery of any specific sum of money, or of any other amount determined or undetermined, against your orators; but your orators aver that the prayer of said bill is confined and limited solely and exclusively to the relief herein before in this bill set forth, and that it did not either expressly or by implication pray for the recovery of any sum of money against your orators.

Your orators aver that, though they were served with a subpœna in said cause notifying them to appear therein, that they were advised and informed by the said J. Fernandez & Company that he had engaged counsel for the defense of the said firm in said suit, and that the attorney appointed for that purpose was Mr. H. E. Smith; and your orators were informed by the said J. Fernandez & Company and by the said H. E. Smith that the latter would appear for the said company of J. Fernandez & Company, and inasmuch as your orators were only silent partners of the said firm, as set forth in the bill of complaint filed in said cause, no especial defense was necessary upon their part by them.

Your orators aver that acting under these representations and in this belief they did not employ or retain the said H. E. Smith, or any other attorney, to represent them especially in the said cause, and that if the said H. E. Smith undertook to appear for or
53 to represent them therein he did so without their authority or consent.

But your orators aver that, reposing confidence in the representations of the said J. Fernandez, and believing that the said H. E. Smith represented as solicitor the firm of J. Fernandez & Company in its capacity as a copartnership, and that they, the said J. Fernandez and the said H. E. Smith would make all proper defenses in the said cause, and your orators believing that they were only formal parties to the said suit, did not retain counsel or appear in the said suit.

Your orators aver that on the 31st day of January 1901, no demurrer, plea, answer, or other pleading having been filed in said cause by J. Fernandez & Company, or by the said H. E. Smith, the solicitor thereof, although your orators believed and expected that such steps would be taken as to secure a proper defense of such action, an order was entered taking said bill of complaint pro confesso; and thereafter, on the 8th day of June, 1901, and without any notice thereof having been given to or received by your orators, a final decree was entered in the said cause without any proofs whatsoever as to the matters and facts therein contained and set forth in the said bill of complaint, although by the rules of chancery and of the Supreme Court of the United States the said bill of complaint should

not have been proceeded with ex parte, and without an answer, and the said decree therein entered was improper,

Your orators aver that by the terms and provisions of the said decree certain transfers made to your orators theretofore by J. Fernandez & Company were set aside and for naught held, and the said J. Fernandez & Company were ordered and decreed to pay the amounts alleged to be due in the said bill of complaint as hereinbefore set forth.

Your orators further show unto your Honor that the said
54 decree has been duly signed and enrolled, but that the same, as your orators insist, is erroneous and ought to be reviewed, reversed and set aside for many apparent errors and imperfections, inasmuch as it appears upon the face of the said bill of complaint the following facts and circumstances:

1st. That this court did not have jurisdiction of the original cause and bill of complaint, for the reason that according to the allegations of said bill all the parties plaintiff were foreign subjects, and all of the parties defendant were citizens of Porto Rico, there being no citizen of the United States or of a State of the United States a party defendant, and no other or sufficient ground or reason for the jurisdiction of this Court is in the said original bill set forth sufficient to give this Court jurisdiction of the said cause.

2nd. Because the allegations of the said bill and the prayer of relief therein did not justify a decree against your orators for the payment of the said sums of money found to be due in said decree in favor of the defendants in said cause.

3rd. Because by the laws of Porto Rico your orators were not and are not responsible for the said sums of money sought to be recovered in the said original bill, and no showing is made in the said bill of complaint establi-hing the responsibility therefor in law or in equity, for the reason that your orators had paid the full amount of their subscription as limited partners of the said firm of J. Fernandez & Company prior to the creation of the alleged indebtedness to Jaffe Bros. & Co. and Hinne & Co., nor was any proof made showing that your orators were liable as aforesaid for any sums alleged to be due by them as special partners in the said firm of J. Fernandez & Company.

4th. Because no recourse could be had against your orators as individual members of said firm of J. Fernandez & Company until it appeared that the partnership assets were insufficient to pay any demand of complainants in said cause.

5th. Because it was erroneous and improper to have entered
55 up a final decree in said cause ex parte upon the face of said bill, without proof to establish the allegations thereof, said bill upon its face requiring discovery of defendants as to certain matters of fact propounded therein by way of interrogatories which were essential and necessary to the relief therein sought.

6th. Because it was erroneous and improper to nullify and set aside in such manner and upon the allegations of said bill the suspension of payments before that time decreed by final judgment as before set forth of a competent Court having jurisdiction of the cause and parties.

7th. Because there was no equity in the said bill and complainants were not entitled to the relief prayed for therein, much less to a decree of a payment of money against your orators.

8th. Because your orators were not represented in said cause by counsel and because they were prejudiced by the action of the said J. Fernandez and the said H. E. Smith, and they were the victims of a mistake as to their rights and obligations in the said suit, and were unconscious of any without knowledge of the purpose to obtain a judgment against them personally or to subject them to any or other further liability beyond that to which they were by the laws of Porto Rico subjected.

9th. Because of the surprise of your orators in not being advised of the said final decree in time to have protected themselves by making a proper defense or opposition thereto.

10th. Because upon the record complainants have not shown their right to recover beyond the securities transferred to them, as appears set forth in Exhibit A, filed with the bill and made a part thereof.

11th. Because the complainants in the said original bill, Jaffe Bros. & Co. and Hinne & Company, have not, prior to the institution of the filing of the said original bill, established their alleged claims by any action or judgment at law, nor have they yet done so.

56 And no proof having been made of the allegations of the said bill of complaint, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed for the reasons aforesaid, and for all of which errors and imperfections in the said decree appearing upon the face of the record in said cause, your orators have brought this their bill for review to be relieved in the premises.

And your orators aver that the said sums of money so sought to be recovered against them have been before this paid by J. Fernandez & Company to the complainants in said cause to and through their representative and duly constituted attorney in fact Benjamin Delgado de Lemos, who received the said payment and certain properties in lieu thereof for and in behalf of the said complainants. And your orators say that this information has come to their knowledge since the said decree, and could not have been obtained before by the exercise of due diligence.

And your orators aver that they are not in law or equity bound to the payment of the said sums of money so sought to be recovered against them, because the same, if it should appear that they are not paid, must be collected of and from the said J. Fernandez & Company as a copartnership or society.

Your orators allege that they have paid in full to Fernandez & Company all amounts subscribed by them as such special partners, amounting to $15,000.00.

But your orators aver that notwithstanding this, defendants herein, except J. Fernandez & Company, are seeking to collect the said sums of money by the said decree above described adjudged in favor of the complainants in the said cause, against your orators.

To the end, therefore, that the said decree may be reviewed, re-

versed and set aside, may it please your Honor to grant unto your orators a reversal and setting aside of said decree and that they be allowed, under the orders of this Court to plead in said cause,
57 and to set up their defense, which they aver to be meritorious, and made only for the purpose of equity and fair dealing, because they do not owe, nor are they liable for the sums of money sought to be recovered of and against them; and meanwhile your orators pray that a writ of injunction issue out of this Court enjoining the said parties complainant in said cause, and an order be directed to the Marshal of this Court prohibiting him from levying any execution under and by virtue of said decree as aforesaid against your orators until the further orders of this Court; and your orators aver their willingness to give such bond as may be in reason and justice fixed by this Court for the protection of the complainants in said cause; and your orators aver their willingness to pay all costs which may have accrued therein.

And your orators further pray that all proceedings had in the said original cause herein, Equity No. 6, instituted by the defendants herein, Jaffe & Co. and Hinne & Co., against J. Fernandez & Co., and your orators in this Court, be annulled and that all orders and decrees therein be set aside as against your orators and said J. Fernandez & Co., and that your orators have and recover from the said defendants herein, Jaffe Bros. & Co., and Hinne & Co. all their costs by them expended in the said original case and in this proceeding.

May it please this honorable Court to issue its writ of subpœna directed to the said J. Fernandez & Company, Victor Fraenkl and John Luis, copartners doing business under the firm name of Jaffe Brothers & Company, and Jobst Hinne and Herman Wolfram, copartners doing business under the firm name of Hinne & Company, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises as shall seem meet and agreeable in equity; and that your orators may have such further or
58 other relief in the premises as the nature of the circumstances may require.

And your orators will ever pray.

DEXTER & HORD, *Solicitors.*

Manuel Cerecedo Millan being duly sworn, upon his oath says that the facts set forth in the foregoing bill are true, according to the best of his knowledge and belief.

MANUEL CERECEDO MILLAN.

Subscribed and sworn to before me this 13th day of Oct. 1903.

H. H. SCOVILLE, *Clerk.*

Opinion Overruling the Demurrer to the Bill for Review and Overruling the Plea to the Jurisdiction in the Principal Case.

(Filed June 1, 1907.)

No. 6. Mayaguez. Creditors' Bill.

JAFFEE BROTHERS & Co.
vs.
J. FERNANDEZ & Co. et al.

and

No. 147. Equity. Bill for Review.

CERECEDO HERMANOS
vs.
J. FERNANDEZ & Co., JAFFE BROS. & Co., et al.

These two causes come before the Court at this time on a plea to the jurisdiction in the principal case, and a demurrer to the Bill for Review.

The principal case was filed in December, 1900, in the Mayaguez District, and the Bill for Review was tendered February 6, 1902, and an amended bill filed October 14, 1903, in the San Juan District. Since the latter date the causes appear to have been considered together at all hearings by previous incumbents of this bench. Inexcusable delay and neglect appears to have intervened in this litigation, for what cause the Court cannot say. The original bill was filed in December, 1900, and a final decree was
59 entered in the same on June 8, 1901. It seems that some of the defendants in the principal case and plaintiffs in the bill for review did not make any defense, and a decree pro confesso was entered against them. When the Marshal of the Court proceeded to execute upon their place of business they at once came in and tendered the Bill of Review above referred to. The record in the two cases is a voluminous one, and, in our opinion, many frivolous and unnecessary pleadings have been interposed. The briefs of the respective counsel are extensive and painstaking, and have required from us for their examination a good deal of time.

After a careful examination of the record, we are of opinion that when a former Judge of this court entered the final decree in the principal case, on June 8, 1901, his action was not authorized under the bill which had been theretofore taken as confessed. Realizing this, that Judge by an opinion which appears among the papers, of date June 11, 1903, permitted the Bill of Review to be filed, for reasons which he sets forth in his opinion, and he re-opened the decree for the purpose of causing proof to be taken on the matters therein alleged so that justice might be done between the parties, and in this action we think he was wholly right,

but because of the condition of things he required the plaintiffs in the bill for review, Cerecedo Brothers, to give a bond in the sum of $15,000.00 for the protection of Jaffe Brothers & Co. and Hinne & Co. the plaintiffs in the principal case, conditioned to abide by and satisfy any judgment that might finally be rendered against plaintiffs in the bill for review. This bond was shortly thereafter filed, and the bill for review was thereupon filed, probably to have effect from the time it was tendered, and a plea was at once interposed by the said Cerecedo Brothers to the jurisdiction of the Court in the principal case, while, on the other hand, the plaintiffs in the principal cause demurred to the bill of review.

We have gone through the briefs of the respective counsel on the two issues thus raised at length and with care, and have ex-
60 amined the authorities referred to, and followed out the reasoning of counsel in support of their contentions. Our duties press upon us so much at this time, and our desire to dispose of these old cases is so strong, that we have not the time to write an opinion such as the issues now raised really merit; and therefore we must content ourselves with stating that we are satisfied the Court originally had jurisdiction in the principal case, and the plea in that behalf will therefore be overruled, and the defendants in said principal case required to fully answer without delay. We are further satisfied that the demurrer to the bill of review is not well taken, and hence it will also be overruled, and the defendants in that cause in like manner required to answer, and if the order has not heretofore been made, it is now hereby made, that said two cases be consolidated and tried together after issue thus joined.

B. S. RODEY, *Judge.*

Answer of Jaffe Bros. & Co. and Hinne & Co.

(Filed June 22, 1907.)

CERECEDO HERMANOS
vs.
JAFFÉ BROTHERS & Co. et al.

Bill of Review.

The joint and several answers of Victor Fraenkl and John Luis, as Copartners under the firm name of Jaffé Brothers & Co., and of Jobst Hinne and Herman Wolfram, as copartners under the firm name of Hinne & Company, to the bill of review of Cerecedo Hermanos.

These defendants, now and at all times hereafter saving and reserving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and other imperfections in said bill of review contained, for answer thereto, or to so much thereof as these
61 defendants are advised it is material or necessary for them to make answer to, answering say:

I.

These defendants admit, according to the allegations of their original bill of complaint, that said firm of J. Fernandez & Company at the time of the filing of said original bill had attempted to declare themselves in suspension of payments, but deny that said proceeding was legally taken according to the laws of Porto Rico then in force, and again allege and stand ready to prove that said proceeding was illegal, fraudulent and void, as by their said original bill they have heretofore alleged. And further these defendants deny that they, or either of them, were parties to and appeared in said proceeding for suspension of payments; or that any valid judgment or decree was ever entered in said proceeding as against these defendants by the Court of First Instance of Mayaguez.

II.

Further answering these defendants say that they have no knowledge, information or belief as to whether the complainants herein had at the time of said pretended suspension of payments fully paid in their subscription as special partners in said firm but aver that such payment, whether made or not, is entirely immaterial to the rights of these defendants; but these defendants deny that said firm of J. Fernandez & Co. had become indebted to complainants herein in the sum of twenty thousand dollars or any other sum, but whether any such pretended indebtedness appears upon the books of account of said complainants these defendants are ignorant but, if any such appears, the same is fictitious and was made so to appear for the fraudulent purpose of swelling the apparent liabilities of said firm of J. Fernandez as is fully set forth and alleged in the original bill of these defendants.

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III.

Further answering, these defendants say that they are ignorant whether or not said complainants specially employed said H. E. Smith, an attorney and counselor of this court, to represent their separate interests in said original suit, but upon information and belief deny the allegation that they did not; and these defendants further say that upon the allegations of said bill of review in this regard complainants show that they were in law and equity bound by the actions of said H. E. Smith, representing himself to be their solicitor and acting for them in all proceedings before this court. And these defendants further aver and stand ready to prove that, at the hearing had before this Court, in the city of Mayaguez on the — day of December, 1900, upon the application of these defendants for the appointment of a receiver in said original suit, one of said complainants, to wit: Manuel Cerecedo, was present in court, consulting with the said Smith as his attorney and then and there knew that said Smith was claiming to represent all the defendants to said original bill; and furthermore that said Manuel Cerecedo did then and there appear as a defendant in said court and did file an affidavit; sworn to by him, in opposition to the appointment of a receiver in said cause.

IV.

Further answering, these defendants deny that a decree pro confesso was entered in the original suit by these defendants on the 31st day of January, 1901, and on the contrary allege that several months were allowed to elapse without applying for such decree, although these defendants were entitled to the same under the rules, in order that all the defendants in said original suit might have ample opportunity to present their defense, and it was only upon the approach of a term of court in the Mayaguez division that the decree pro confesso was entered in order that, after the lapse of thirty days, these defendants might apply at said term for the entry of the final decree to which they had then become entitled by the default of the defendants therein.

63 These defendants further aver that said final decree was presented, signed and entered during an open session of this court during the June Term thereof in said city of Mayaguez during a regular call of the equity docket, at which it is the duty of counsellors having business in the court to be present; that these defendants had by their previous preliminary decree pro confesso been permitted and authorized to proceed ex parte; and that these defendants were entitled, under the law and the rules of practice in equity as fixed by the Supreme Court of the United States, without the taking of any evidence to ask for an- receive such final decree in their favor as to them might seem beneficial, provided only that such decree was warranted by the allegations of their bill of complaint, the truth of which had been as aforesaid confessed by the complainants herein. And these defendants aver that the terms of said final decree were so warranted by the allegations of their bill, even though these defendants might have obtained further and more specific relief had they so desired.

V.

Further answering, these defendants deny that the several sums of money found to be due from them to defendants have been paid by the complainants or said firm of J. Fernandez & Co., and further deny that one Benjamin Delgado de Lemos was ever authorized to make any compromise or settlement of said indebtedness by accepting certain properties in lieu of money on behalf of these defendants; and they aver that whatever property was received by said de Lemos was tendered back by these defendants, which tender still remains on file in this honorable court in this cause, and these defendants now renew the same and again offer to execute and deliver whatever contracts and conveyances may be necessary to carry the same into effect; and that these defendants have never accepted or derived any benefit from such alleged settlement.

Wherefore, these defendants, having fully answered, confessed, traversed and avoided or denied all the matters in said bill

64 of review contained, material to be answered unto as these defendants are advised and according to the best of their knowledge and belief, humbly pray this honorable court to enter its

judgment that these defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, from all penalty or liability by virtue of anything in said bill of review contained; that the relief prayed for in their original bill may be decreed by the court in such form as the court may be advised; and that these defendants may have such other and further relief under their said original bill as to this honorable court may seem meet and in accordance with equity.

N. B. K. PETTINGILL,
Counsel for Defendants Jaffe Bros. & Co. and Hinne & Company.

Replication of Complainants Cerecedo Brothers to the Joint and Several Answers of Defendants Jaffe Bros. & Co.

(Filed March 31, 1908.)

CERECEDO HERMANOS
vs.
JAFFE BROS. & CO. et al.

These replicants, Cerecedo Brothers, saving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the Answer of Defendants, for replication thereunto say that they do and will ever maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said Defendants, and that the Answer of said Defendants is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said Answer contained, material or effectual in the law to be replied unto and not
65 herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

F. H. DEXTER,
Solicitor for Complainants Cerecedo Bros.

Demurrer of Defendants Cerecedo Brothers to the Bill of Complaint.

(Filed March 31, 1908.)

JAFFE BROTHERS & COMPANY et al.
vs.
J. FERNANDEZ & COMPANY et al.

These defendants, respectively, by protestation, not confessing nor acknowledging all nor any of the matters and things in the said Plaintiffs' bill to be true in such manner and form as the same are

therein set forth and alleged, demur to the same and for reason — that it does not set forth facts sufficiently to justify this Court in granting the relief prayed for as against these defendants, Cerecedo Brothers, nor as against any of the Defendants herein.

Wherefore, Defendants, Cerecedo Brothers, pray to be hence dismissed with their costs.

F. H. DEXTER,
Solicitor for Defendants Cerecedo Bros.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

F. H. DEXTER,
Solicitor for Defendants Cerecedo Bros.

Manuel Cerecedo, being duly sworn, upon his oath says that he is one of the partners composing the firm of Cerecedo Brothers, Defendants above-named; that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

CERECEDO HERMANOS & CO.
MANUEL CERECEDO.

66 Subscribed and sworn to before me this 31st day of March, 1908.

[Notarial Seal of Damian Monserrat.]

DAMIAN MONSERRAT,
Notary Public.

Journal Entry.

(April 3rd, 1908.)

No. 147.

CERECEDO BROTHERS
vs.
JAFFE BROTHERS & Co. et al.

Counsel for both parties now appear and show to the Court that on June the 22nd, 1903, a former Judge of this Court entered an order herein allowing this Bill of Review to be filed and the final decree in the original suit to be opened up and required, among other things, the defendants in the original suit to make their defense therein as well as the defendants of this Bill of Review to answer the latter.

It appearing from the record that the pleadings at the present time stand upon a demurrer to the original bill and an answer and replication to the Bill of Review, making an issue in the latter. Counsel for both parties to this Bill of Review unite in requesting the Court to order the suspension of further proceedings in the original suit until the determination of the equities raised by the Bill of

Review, and it appearing to the Court that such request is in accordance with the rule of orderly pleading and that that part of said order of June 22, 1903, which opens the final decree in the original suit was improvidently made at that stage of the case, it is hereby ordered that further proceedings in the original suit be suspended and the effect of that part of the order last aforesaid, opening the said final decree therein, be vacated until the final determination of the questions raised by the Bill of Review and that the issue made upon said bill of review stand for hearing before the Court at
67 such early day as the Court may be able to hear the same.

It is further hereby ordered that the final provision of said order of June 22, 1903, consolidating said original suit with this Bill of Review and ordering the two to be tried together, be hereby vacated and the Clerk is directed that the papers and proceedings in said causes be separated; and that the complainants in the original suit take no action toward the execution of said final decree therein until a final decree shall be rendered in this proceeding.

B. S. RODEY, *Judge*.

Jaffe. *Journal Entry*

October 30, 1908.

Equity. 6 Mayaguez.

JAFFE BROTHERS & Co.
vs.
J. FERNANDEZ et al.

Equity. 147.

CERECEDO BROTHERS
vs.
J. FERNANDEZ & Co. et al.

Although a hearing was set for this date in cause No. 147 entitled as above, before proceeding therewith F. H. Dexter, Esq., counsel for complainant therein, requests that the argument of the issue involved remain in abeyance and that he be permitted to re-argue the plea to the jurisdiction which was heretofore decided against him in the original case No. 6, Mayaguez, entitled as above, out of which the second cause arose, and after consideration of the matter the Court grants such motion and the argument is proceeded with, N. B. K. Pettingill, Esq., apearing in opposition thereto; and at the conclusion of such argument the Court takes the matter under advisement, it being understood that the respective counsel in addition to their oral argument, also submit their briefs on file in that behalf.

It appearing further that an order consolidating the two above entitled causes was thereafter vacated, it is now ordered that
68 they shall regain and proceed under their original numbers and titles.

(Opinion Deciding Against Jurisdiction of Original Bill and Ordering Its Dismissal.)

(Filed February 1, 1909.)

No. 6, Mayaguez.

JAFFE BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al.,

and

No. 147, San Juan.

CERECEDO BROS.
vs.
JAFFE BROS. & Co. et al.

The matter before us is a renewed plea to the jurisdiction. The controversy here is really but one suit. It was filed in the Mayaguez District of this Court on November 19, 1900, and hence is one of the oldest cases on the docket. After a considerable legal battle, a receiver was appointed (1 P. R. 299), who, it is said, never qualified because, as it is said, he could obtain possession of no assets. After default and a decree pro confesso, a final decree was entered in the original suit under date of June 8, 1901. This decree was entered without any proofs whatsoever save the allegations of the bill, which, although sworn to, are not very specific. When an attempt was made to proceed under the decree against some of the original respondents, they came in on February 6, 1902, and tendered a bill for review, which was numbered 147 and entitled as secondly in the caption above set out. The then Judge of this Court wrote an opinion in the case permitting the filing of this bill of review. 1 P. R. Fed. 53. In the opinion he sets out in substance that the decree was not in conformity with the prayer of the bill, etc., but because he permitted the bill of review to be filed, he forced the petitioners therein to pay the costs up to that time and give bond in the sum of fifteen thousand dollars to protect the original complain-
69 ants in the suit which was done. So much time having elapsed since the original suit was brought, this bond is probably all that gives substance to the litigation at this time.

A good deal of controversy took place with reference to the matters in litigation about the time this bond was filed, and on October 13, 1903, a plea to the jurisdiction for lack of diverse citizenship, such as is contemplated by the several Acts of Congress, was interposed. It does not appear that this plea was at that time passed upon. The pleadings were from time to time amended and many demurrers, exceptions and dilatory motions were filed.

On June 1, 1907, we wrote an opinion on the plea and demurrer in this case, overruling both of them (see 3 P. R. Fed. 73. We

stated in that opinion that it was rendered hurriedly and intimated that we had doubts about the rule laid down. Recently the parties re-argued the plea to the jurisdiction and filed briefs therein, to which we have given careful attention.

On the one hand counsel for respondents contends that the Court at the time of the filing of the original suit in November 1900, had no jurisdiction because the amendment of 1901 to the Foraker Law had not at that time been passed, and that, as the complainants are Scotch and German mercantile firms and the respondents are all Porto Ricans, the Court was in fact without jurisdiction. Counsel for complainants replies to this that the Court had jurisdiction because a suspension of payments law passed by the Military Commander here in Porto Rico while the Island was under military government, was in question, and that this amounted to such a federal question, as gave the Court jurisdiction, independent of the citizenship of the parties.

We have examined the question now more extensively than we did before, and, however reluctant a court may be as to reversing
70 itself, it should not hesitate to so do if it was wrong, so long as it still has full control of the record. We therefore are constrained to hold that we were mistaken in our view of the law under the facts of the case in our opinion in 3 P. R. Fed. 73, and we are further of the opinion that a federal question to give jurisdiction must be the actual foundation of the suit and not something coming in incidentally, and that the suspension of payments law referred to was not an Act of Congress but a mere military order.

Therefore the plea to the jurisdiction will be sustained and the whole case as above entitled under two headings will be di-missed, but the complainants will not be required to pay any costs save those that accrued since the filing of the bond, the respondents having paid the costs to that date, they will be left in that condition.

Journal Entry.

(February 9, 1909.)

6. Equity, Mayaguez.

JAFFE BRO.- & CO. et al.
vs.
J. FERNANDEZ & CO. et al.

and

147. Equity, San Juan.

CERECEDO BROTHERS
vs.
JAFFE BROS. & CO. et al.

In this cause it appearing that a short final decree dismissing the same under the above double caption was entered under date of

February 1st, instant, and the same not being satisfactory to counsel, they now present a final decree in the premises, and request that the same be substituted for, and entered nunc pro tunc as of date February 1, 1909, which is done, the same being as follows:

Final Decree.

The issues upon the Bill of Review in this cause having heretofore been made up, one of said issues being the question of
71 the jurisdiction of this court, over the original suit of Jaffé Brothers & Co. et al. vs. J. Fernandez & Co. et al., being No. 6 in the Equity Docket of this Court at Mayaguez; and this Court having at the request of counsel for the complainants herein heard and considered preliminarily the said issue of the jurisdiction of this Court under the allegations of the said original bill and having, upon consideration thereof, heretofore, to wit: on the first day of February, 1909, sustained the plea of these complainants to such jurisdiction, holding that it appeared upon the face of the record in said original suit that this court was without jurisdiction to entertain the same, as set forth and alleged in this Bill of Review;

It is, therefore, hereby ordered, adjudged and decreed That this bill to review the proceedings of this Court in said original cause be, and the same hereby is, sustained for the reason aforesaid; that the decree entered by this court on the 8th day of June, A. D. 1901, in the City of Mayaguez, in favor of Complainants in said original suit, the same being as aforesaid No. 6 on the Equity Docket at Mayaguez entitled Jaffe Brothers & Company and Hinne & Company vs. J. Fernandez & Company and Cerecedo Brothers, be, and the same hereby is, vacated and annulled; and that said original bill of complaint be, and the same hereby is, dismissed without prejudice, with costs of this Bill of Review in favor of the complainants herein.

Done and ordered in open Court at San Juan this 9th day of February, A. D. 1909.

B. S. RODEY, *Judge.*

And thereupon counsel for the respondents in case No. 147 above present their petition praying an appeal to the Supreme Court of the United States, which goes to the files, and the court having examined the same grants said appeal. Upon which the said
72 respondents by their said counsel at once file a cost bond in the premises in the sum of $250.00 which is then and there approved by the Court and ordered to the files, whereupon:

It is further ordered that the said appellants be, and they hereby are required to file with the Clerk of this Court their praecipe for the transcript in the premises, within three weeks from this date, and that thereafter within the time provided by law, the Clerk shall prepare such transcript of record and transmit the same to the Honorable the Supreme Court of the United States in manner and form as required by law.

Petition on Appeal.

(Filed February 9, 1909, as of February 1, 1909.)

No. 147. Equity, San Juan.

CERECEDO BROTHERS
vs.
JAFFÉ BROTHERS & Co. et al.

Bill of Review.

To the Honorable Bernard S. Rodey, Judge of the Court aforesaid:

The defendants in the above entitled cause, who were complainants in the original suit, No. 6 on the Equity Docket of this Court at Mayaguez, which this bill was brought to review, to wit: Victor Fraenkl and John H. Luis, as copartners under the firm name of Jaffé Brothers & Company, and Jobst Hinne and Herman Wolfram, as copartners under the firm name of Hinne & Company, conceiving themselves aggrieved by the order and decree this day made and entered in the above entitled cause, wherein and whereby this Bill of Review is considered and sustained, the final decree hereby reviewed is vacated and annulled, and the bill of complaint in said original suit ordered to be dismissed for want of jurisdiction in this court to entertain the same and enter a decree thereon, do hereby appeal from said final order and decree to the Supreme Court
73 of the United States for the reasons to be set forth in an assignment of errors to be filed herein; and they pray that this their petition of appeal may be allowed, and that a transcript of the record and proceedings upon which said final decree was based, including the record and proceedings in said original suit, duly authenticated, may be sent to said Supreme Court of the United States.

Dated at San Juan, this 9th day of February, 1909.

N. B. K. PETTINGILL,
Solicitor for Defendants, Appellants.

Cost Bond on Appeal.

(Filed February 9, 1909.)

Equity. No. 147, San Juan.

CERECEDO BROTHERS
vs.
JAFFE BROTHERS & Co. et al.

Bill of Review.

Know all men by these presents that we, N. B. K. Pettingill, as attorney for Jaffé Brothers & Company and Hinne & Company, com-

plainants in the original bill of complaint and defendants in this Bill of Review, as principal, and A. J. Harvey and F. L. Cornwell as sureties, are held and firmly bound unto the Clerk of the District Court of the United States for Porto Rico, for the use and benefit of whom it may concern, in the penal sum of Two Hundred and Fifty Dollars ($250) to be paid to the Clerk of said Court, or his successor or successors in office, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of February, A. D. 1909.

Whereas lately, at a Session of said District Court of the United States for Porto Rico in a Bill of Review pending between the above named parties, the same being No. 147 of the Docket of said
74 Court at San Juan, the defendants therein who were complainants in the original bill having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the final decree therein sustaining said bill of Review and also vacating the former final decree entered in said original suit and entering a decree dismissing said original bill therein for want of jurisdiction:

Now the condition of the above obligation is such that if the said Jaffé Brothers & Company and Hinne & Company shall prosecute their said appeal to effect, and shall answer for all costs that may be awarded against them, if they fail to make their plea good, then the above obligation is to be void, else to remain in full force and virtue.

N. B. K. PETTINGILL. [SEAL.]
ARTHUR J. HARVEY. [SEAL.]
F. L. CORNWELL. [SEAL.]

Approved 2/9/1909.
B. S. RODEY, *Judge.*

Assignment of Errors.

(Filed February 17, 1909.)

Equity, No. 6, Mayaguez.

JAFFÉ BROTHERS & Co. et al.
vs.
J. FERNANDEZ & Co. et al.

and

No. 147, San Juan.

CERECEDO BROTHERS
vs.
J. FERNANDEZ & Co. et al.

Bill of Review.

Come now the complainants in the original bill of complaint above entitled, being defendants in the Bill of Review as aforesaid and now

appellants, by their counsel, N. B. K. Pettingill, and assigns the following as the errors committed by the Court below during the proceedings upon said Bill of Review and in the final decree entered thereon:

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I.

The court erred in granting the Petition to file said Bill of Review and in allowing the same to be filed by its order of June 13th, 1903.

II.

The court erred in ordering at the same time aforesaid the final decree in said original suit to be opened up and allowing complainants in said Bill of Review to plead to said original bill before the issues raised by the Bill of Review had been litigated and determined.

III.

The court erred in overruling the demurrer filed to said Bill of Review by the defendants thereto who are now appellants.

IV.

The court erred in entering its final decree sustaining said Bill of Review as sufficient to set aside the final decree upon said original bill, and in dismissing said original bill for want of jurisdiction.

V.

The court erred in sustaining the plea to the original bill, questioning the jurisdiction of the court.

VI.

The court erred in not entering a final decree dismissing the Bill of Review for want of proper averments to sustain it and establishing the validity of the final decree in the original suit.

Wherefore these appellants pray the Honorable, the Supreme Court of the United States, to examine and correct the errors assigned, and for the reversal of the final decree of said District Court of the United States for Porto Rico entered in the above entitled cause.

N. B. K. PETTINGILL,
Counsel for Appellants, Complainants in Original Bill and Defendants in the Bill of Review.

76 *Præcipe for Transcript of Record.*

(Filed February 16, 1909.)

Equity, No 6, Mayaguez.

JAFFÉ BROS. & Co. et al.
vs.
J. FERNANDEZ & Co. et al

and

No. 147, San Juan.

CERECEDO BROTHERS
vs.
JAFFÉ BROS. & Co. et al.

Bill of Review.

In making up the transcript of the record on the appeal to the Supreme Court of the United States, taken by the defendants in the Bill of Review who were complainants in the original suit aforesaid on the 9th day of February instant, the Clerk of the Court will please include the following pleadings and proceedings in each of said suits, to wit:

Original Bill of Complaint, with its Exhibits A & B	filed on	Nov.	19,	1900
Subpœna issued to the firm of Cerecedo Bros., with service of same	"	"	24,	"
Special appearance of H. E. Smith Esq. as counsel for def'ts	"	Dec.	5,	"
Journal entry of hearing on application for Receiver	entered	"	5,	"
Order appointing Receiver	"	Jan.	14,	1901
Stipulation of Counsel	filed	Feb.	4,	"
Amendment of Bill of Complaint	"	"	23,	"
Order taking Bill Pro Confesso with certificate of its entry in the Order Book	"	"	25,	"
Final Decree	entered	June	8,	"
Two Executions, with returns of non-service	filed	July	1,	"
Petition for Leave to File Bill of Review	tendered	Feb.	6,	1902
77 Opinion granting said petition	entered	June	22,	1903
Bond for $15,000, given by Cerecedo	filed	"	—,	"
Demurrer of Jaffe Bros. & Co. to Bill of Review	"	Oct.	13,	"

Plea to the jurisdiction and demurrer to the original bill	"	"	"	"
Amended Bill of Review	filed	October	14,	1903
Journal Entry referring to same	entered	"	"	"
Opinion overruling both demurrer to Bill of Review and plea to jurisdiction of original bill	"	June	1,	1907
Answers of original complaints to the Bill of Review	filed	June	22,	"
Replication of Cerecedo Bros. to said answers and their demurrer to the original bill	"	March	31,	1908
Journal entry of		October	30,	"
Order vacating previous order of consolidation	"	April	3,	"
Opinion deciding against jurisdiction of original bill and ordering its dismissal	"	Feb.	1,	1909
Final Decree, in accordance with foregoing opinion	entered	"	9,	"
Petition of appeal and appeal bond, with Journal entry allowing said appeal, etc	filed	"	"	"
Assignment of Errors	"	"	"	"

And as soon as said Transcript can reasonably be prepared, please transmit the same, with proper certificate, to the Clerk of said Supreme Court.

N. B. K. PETTINGILL,
Counsel for Jaffé Bros. & Co. and Hinde & Co., Appellants.

Additional Præcipe for Record on Behalf of Cerecedo Bros.

(Filed Feb. 17, 1909.)

JAFFE BROS. & COMPANY et al.
vs.
J. FERNANDEZ & COMPANY et al.

78

and

CERECEDO BROTHERS
vs.
JAFFE BROS. et al.

To the Clerk of the above Court:

Having received from Counsel for Appellants in the above-entitled causes copy of the præcipe for the record to be transmitted to the Supreme Court of the United States, I observe that it omits the Bill for Review, which is the basis of one of the above suits. You

will please, therefore, include in the Transcript of Record the following papers and entries:

(1) Petition for leave to file Bill for Review, which was filed February 6, 1902, and Not April 2, 1902, as erroneously stated in the præcipe of the Appellants.

(2) The Bill for Review, which appears by the filemarks of your office to have been tendered February 6, 1902.

(3) Journal Entry of June 22, 1903, permitting filing of said Bill for Review.

(4) Amended Bill filed October 14, 1903, and entry relative to the same.

F. H. DEXTER,
Attorney for Defendants-in-Error, Cerecedo Brothers.

79 In the District Court of the United States for Porto Rico.

No. 6, Equity. Mayaguez.

JAFFE BROS. & CO. et al.
vs.
J. FERNANDEZ & CO. et al.

and

No. 147, Equity. San Juan.

CERECEDO BROS.
vs.
JAFFE BROS. & CO. et al.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing typewritten pages numbered from "1" to 79" inclusive, to be a true and correct copy of the record and proceedings in the above-entitled causes as the same remain of record and on file in the office of the clerk of said court, as called for by the præcipes filed by counsel of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of March, A. D. 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk, District Court of the United States for Porto Rico.

Endorsed on cover: File No. 21,589. Porto Rico, D. C. U. S. Term No. 411. Victor Fraenkl and John H. Lewis, Copartners under the firm-name of Jaffe Brothers & Company, and Jobst Hinne and Herman Wolfram, Copartners under the firm-name of Hinne & Company, Appellants, vs. Manuel Cerecedo, Enrique Cerecedo, Jose Cerecedo, and Francisco Cerecedo, Composing the Copartnership of Cerecedo Hermanos. Filed April 7th, 1909. File No. 21,589.

[redacted]

In Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 411.

JAFFÉ BROTHERS & CO. ET AL., Appellants,

vs.

CERECEDO BROTHERS, Appellees.

BRIEF FOR APPELLANTS.

[redacted]
Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 411.

JAFFÉ BROTHERS & CO. ET AL., APPELLANTS,

vs.

CERECEDO BROTHERS, APPELLES.

BRIEF FOR APPELLANTS.

Statement.

The case is presented upon the appeal of the complainants to an original suit, who are also defendants to a bill of review brought by appellees from a final decree of the District Court of the United States for Porto Rico, vacating and annulling the final decree in favor of appellants in the original suit and dismissing the original bill of appellants for want of jurisdiction.

The original bill of complaint was filed on the 19th day of November, 1900, by the present appellants against José Fernandez, as liquidator of the mercantile firm theretofore doing business in Mayaguez, Porto Rico, under the firm-name of J. Fernandez & Company, another mercantile firm

doing business in San Juan, Porto Rico, under the name of Cerecedo Hermanos (Brothers), and three individuals, named respectively Victor Martinez, Demetrio Bolta, and Alfredo Arnaldo. The complainants were alleged to be foreigners and the defendants citizens and residents of Porto Rico.

The bill alleged, among other things, that defendant José Fernandez was the only general partner of the firm of J. Fernandez & Co., while defendant firm of Cerecedo Hermanos and defendant Victor Martinez were special partners, having each contributed to its capital stock the sum of 10,000 pesos, provincial money, and remained such special partners during the happening of the events alleged; that said firm of J. Fernandez & Co. had expressly acknowledged its indebtedness to complainants in the respective sums following, to-wit: To Jaffé Bros. & Co. in the sum of £2,308, 11s., 6p., and to Hinne & Co. in the sum of 8,068 marks, both due and bearing interest since December 31, 1899; that early in the year 1900 defendant firm of J. Fernandez & Co., having become embarrassed in business, fraudulently conspired and combined with the other defendants, including the special partners, so to manipulate its affairs and dispose of its assets as to defraud its creditors; that, in pursuance of such conspiracy, defendant Fernandez, as the managing partner of said firm, in consequence of a demand by Jaffé Bros. & Co. for the payment of their claim, proposed and induced the latter to enter into an agreement whereby said Fernandez was to deliver to them certain securities for the payment of the same (a copy of which agreement is attached to the bill, printed record, pages 9-13); that said Fernandez did not at the time of entering into said agreement intend to fulfill the same, but proposed and executed it for the purpose of deceiving Jaffé Bros. & Co. and thus obtaining a further delay; that the defendant Arnaldo, the notary who drew said agreement, fraudulently and falsely represented to the agent of Jaffé Bros. & Co. that it was

impossible to fix a date therein for the delivery of said securities, and induced him to sign the same without such date being fixed; that by said subterfuge further delay in payment was secured, and, when the agent of Jaffé Bros. & Co. again demanded the carrying out of said agreement to furnish securities, said Fernandez, with like fraudulent intent, proposed and induced said agent to accept a modification thereof, by reason whereof said agent found it necessary to apply to his principals for ampler power to act, and that, as soon as said Fernandez received from said agent notice that said power was being forwarded from England, he proceeded to fraudulently avoid complying with the proposition which he had himself made by applying, on the 26th day of April, 1900, for an order of suspension of payments, then provided for in certain cases by the laws of Porto Rico (promulgated by Major General George W. Davis while military governor of Porto Rico on December 21, 1899, being General Order No. 224, and continued in force as law by section 8 of the Act of Congress approved April 12, 1900), and thereafter obtained such an order by fraudulent means as subsequently in said bill specified.

The bill then proceeded to allege that the total *bona fide* indebtedness of said firm of J. Fernandez & Co. was less than $100,000.00, of which not less than $38,000.00 was held by European creditors, and, in order to comply with the provision of the law requiring that the meeting of their creditors should be attended by creditors representing at least four-fifths of the amount of indebtedness, and also in order to obtain a majority of persons claiming to be creditors at said meeting who would be subservient to the wishes of the conspirators, said firm fraudulently issued fictitious evidences of indebtedness to an amount which made the apparent indebtedness more than $200,000.00; that among such fictitious evidences of indebtedness were the amounts pretended to be due the special partners, to-wit: $27,000.00 to Cerecedo Brothers and $17,500.00 to Victor Martinez; that

none of the foreign creditors were notified of, or took part in, said meeting of creditors, and that only by the use of the fraudulent methods aforesaid were said defendants able to obtain the four-fifths representation at their meeting of creditors and so carry out their fraudulent purpose of obtaining an order placing said firm in suspension of payments.

The bill then referred to the provisions of the law for suspension of payments, to the effect that after an order allowing such suspension was granted the party in whose favor it had been granted was prohibited from making any disposition of his or their property other than for the purpose of paying the debts or carrying out contract obligations existing at the time of the suspension, and alleged that certain of the securities described in and covered by the agreement with Jaffé Bros. & Co., above referred to, which could not lawfully be used for any other purpose than that aforesaid, had subsequently been apparently disposed of by said Fernandez, as liquidator, to defendant Demetrio Bolta for half their value; that in fact said Bolta was a man without means and paid no consideration whatever for said transfer, but the same was made for the sole purpose of defrauding Jaffé Bros. & Co. out of their right to such securities under the agreement aforesaid, and said Bolta was a mere man of straw, who had paid no value, but was acting and holding the title of said securities fraudulently for the benefit of said special partners, Cereceda Bros. and Victor Martinez, and that said securities were still legally and equitably the property of said firm of J. Fernandez & Co.

The bill further alleged that, although it was contrary to the provisions of the law of suspension of payments above referred to for a party under such suspension to dispose of any property except through the Syndicos (trustees) selected by the creditors, defendant Fernandez, after the order of suspension and election of the Syndicos, had not only made the fraudulent transfer of the securities above described but had fraudulently and clandestinely, either without the knowledge

of the Syndicos or with their connivance, turned over to the special partners aforesaid, in fraud of the creditors, goods and personal property belonging to said firm of J. Fernandez & Co. to a large amount, the exact amount and character of the same being unknown to the complainants; and that the Syndicos elected at the meeting of creditors were paying no attention to the affairs of the firm but were allowing said Fernandez to run such affairs to suit himself.

The bill further alleged that no one but the defendants knew whether said firm of J. Fernandez & Co. was insolvent or not, but that, if it were not then, it soon would be, as it was the fraudulent intention of the defendant conspirators to waste and divert the assets of said firm from the creditors, and especially the complainants, to their own benefit; and that the only way to prevent that result was by the appointment of a receiver for its business and property. The bill then stated the amount of assets and liabilities of the firm according to the statement which it had filed in the proceeding to obtain the suspension of payments and alleged that among said assets appeared the stocks of goods and merchandise in three different places amounting in value to over 73,000 pesos, provincial money, a large part of which had already disappeared and been disposed of by defendants fraudulently without benefit to the creditors.

The bill then propounded certain interrogatories to defendant José Fernandez, waived the oath of the defendants to the answer to the bill, and prayed: (1) for the specific performance of the agreement above referred to between J. Fernandez & Co. and Jaffé Bros. & Co., or the payment to them by the receiver of any amount collected by him out of said securities after his appointment to be applied on said indebtedness; (2) that defendants be enjoined from appropriating to their own use any part of said securities or their proceeds; (3) that a receiver be appointed for the purpose of winding up the business of J. Fernandez & Co. for the benefit of its creditors with the usual specifications as to powers

and duties and requiring all persons to deliver up property and abstain from interfering with the receiver's possession and control; (4) that Jaffé Bros. & Co. be allowed to participate in the general distribution for the balance due them after the application to their claim of the proceeds of the securities aforesaid; (5) that both complainants be allowed their expenses and attorney's fees out of the fund preserved by these proceedings; and that—

> "Your orators may have such other and further relief in the premises as equity may require and as may be necessary to fully protect and enforce the rights and equities of your orators, and as to your honor may seem meet."

This bill was sworn to by the "agent and representative" of Jaffé Bros. & Co. and, with its exhibits, constitutes pages 1 to 13 of the printed record.

Service of subpœna was made on the defendant firm of Cerecedo Brothers on November 21, 1900, and on December 3rd, following, Herbert E. Smith, a member of the bar of that court, entered an appearance for all the defendants which, though special in form, was general in legal effect (page 15).

The application of complainants for the appointment of a receiver was heard during the 4th, 5th, and 6th days of December, 1900, and the matter remained under advisement by the court until the 14th day of January, 1901, on which day an order was made appointing a receiver (pages 16-18). But the receiver never qualified because all the remaining personal assets had meantime disappeared.

On the 4th day of February, 1901, a stipulation, which had been entered into four days previously, was filed, extending time of defendants until the 20th day of February, 1901, to demur, plead or answer (page 18). This stipulation was signed by Herbert E. Smith, Esq., the attorney aforesaid, in representation of all the defendants.

As no pleading had been filed within the limit of time, as thus extended, complainants took an order *pro confesso*, which was entered on the 23rd day of February, 1901 (page 19).

In this state the cause remained from February until June, 1901, without defendants taking any steps to open the decree *pro confesso* or to make any defence to the allegations of the bill; after which, and on the 8th day of June, 1901, complainants applied for in open court at Mayaguez and obtained a final decree in their favor, based upon the sworn allegations of their bill and the order *pro confesso*, previously entered as aforesaid.

This decree (R., 19 to 21) recited the filing of the bill of complaint, the entry of appearance by all the defendants on the 3rd day of December, 1900, and their representation by Mr. Smith at the argument upon the application for appointment of a receiver in opposition thereto, the failure of defendants to demur, plead or answer to the bill as required by the rules of the court, the order taking the bill *pro confesso*, and the failure of the defendants, or any of them, to take any further step since that time. It then proceeded to adjudge that the equities of the case were with the complainants and to determine the amount of indebtedness due from defendant firm of J. Fernandez & Co. to each of complainant firms, and decreed that all the members of the said debtor firm, including special as well as general partners, were liable to pay the same. It further adjudged and decreed the pretended indebtedness of said debtor firm to its special partners to be fictitious, fraudulent, and void, and ordered set aside as fraudulent and cancelled the transfer from Fernandez to Bolta of the securities covered by the agreement between J. Fernandez & Co. and Jaffé Bros. & Co., referred to in the bill of complaint. It closed by a formal judgment against said members of the firm of J. Fernandez & Co. for the respective amounts found to be due, and authorized the issuance of executions for the same, if not paid within sixty days from that date (pages 19-21).

In pursuance of the money judgment included in the terms of the above decree complainants, as the simplest method of obtaining the relief to which they had been decreed entitled, caused executions to issue on the 31st day of January, 1902; but, the proceedings upon them being suspended pending the consideration of the petition of Cerecedo Brothers *for leave to file* their bill of review, as is now to be explained, they were later returned unexecuted (pages 21-22).

At this point begins the second stage of this litigation. As soon as efforts were begun to make effective the executions, issued as above stated, said firm of Cerecedo Brothers employed other counsel who, on the 6th day of February, 1902, filed in the court their petition for leave to file a bill of review (page 23), and therewith tendered the bill itself, which they proposed to file (pages 27-31). Said counsel, however, thereafter permitted their petition to lie without action by the court until the *22nd day of June, 1903*, on which day the court made an order granting the same and allowing the filing of the bill of review (pages 24-26).

The court will note the statement in the first paragraph of said order that opposition was made by us to the granting of this petition and the filing of said bill on the ground that it was done too late, yet no request was made on behalf of complainants to bill of review that the action of the court allowing the bill of review to be filed should be considered as taken *nunc pro tunc*. Attention is also called to the statements in the later paragraphs of other grounds of opposition urged.

A comparison of dates shows that *more than two years* had elapsed between the entry of the final decree and the date of the filing of the bill of review. It will also be noted that the above order not only allowed the filing of the bill of review but, even at that *preliminary stage*, actually *vacated the final decree* in the original suit, allowed the complainants in the bill of review to make immediate defense to the

original bill, and "these causes" were "consolidated and ordered to be tried together" (page 26).

Thereafter, at the expiration of time fixed by the court in said order, the appellants filed their demurrer to the bill of review (pages 33-34) and Cerecedo Brothers filed a plea to the jurisdiction as their first defense to the original bill (page 33). On the following day Cerecedo Brothers, by permission of the court, filed their amended bill of review (pages 35-40). As this had been entirely re-drawn and was substituted for the bill of review first filed, we will confine our attention to the amended bill, which was, after containing a short reference to the original suit, in substance as follows:

> That the firm of J. Fernandez & Co., having been in suspension of payments at the time of the filing of the original bill, was allowed three years under the law within which to pay their debts, which period had not then elapsed.
>
> That neither at the time of the filing of their bill nor since had the original complainants established their claims against said firm by judgments at law.
>
> That the allegations of said original bill about Cerecedo Brothers having received certain transfers and payments in fraud of complainants therein, as well as the remaining allegations of said original bill, were immaterial and irrelevant and not necessary to be set forth in the bill of review.
>
> That Cerecedo Brothers had fully paid their part of the capital of J. Fernandez & Co. as special partners, and, in addition thereto, said firm was indebted to them, Cerecedo Brothers, as individuals and not as special partners in the sum of $20,000.
>
> That the prayer of the original bill was to have declared fraudulent the transfers and payments from J. Fernandez & Co. to Cerecedo Brothers and to have the order of suspension of payments annulled, but that there was no prayer for the recovery of any specific sum of money against Cerecedo Brothers, thus limiting the rights of the complainants in the original bill to the specific relief above stated.
>
> That, although Cerecedo Brothers were served with a subpœna to appear as defendants in said original

cause, they were advised by J. Fernandez & Co. that counsel had been retained for that firm in the person of H. E. Smith, Esq., and were further advised by Mr. Smith that, as Cerecedo Brothers were only silent partners in the former firm, the latter needed no special defense; that on that account they did not employ Mr. Smith and, if the latter undertook to represent them, he did so without their authority or consent; and that, relying on said representations of Fernandez and Smith and believing they were only formal parties, they did not retain counsel or appear in said suit.

That, although Cerecedo Brothers believed and expected steps would be taken by J. Fernandez & Co. and said Smith to secure a proper defense of said action, no such steps were by them taken, and for lack thereof a decree *pro confesso* was entered against all the defendants in said suit on the 31st day of January, 1901, and thereafter a final decree on the 8th day of June, 1901, without any notice to Cerecedo Brothers and without any proofs, wherefore the decree entered therein was improper, because, under the chancery rules of the Supreme Court, the bill should not have been proceeded with *ex parte* and without answer.

The substance of the decree is then very briefly stated, and it is alleged that the same had been duly enrolled, but that it was erroneous and ought to be reviewed and set aside for errors apparent on its face in the following respects:

1st. The court did not have jurisdiction of the cause.

2d. The allegations of the bill and the prayer for relief did not justify a money judgment against Cerecedo Brothers.

3d. Under the laws of Porto Rico said special partners were not responsible for said debts, and the allegations of the original bill did not establish such responsibility.

4th. No recourse could be had against special partners until it appeared that the partnership assets were insufficient.

5th. It was improper to enter up a final decree *ex*

parte and without proof where discovery was sought for.

6th. It was improper to nullify by such a decree the suspension of payments which had been theretofore decreed by a competent court.

7th. There was no equity in the original bill and complainants therein were not entitled to the specific relief prayed for, much less to a money judgment.

8th. Cerecedo Brothers were not represented in the original suit by counsel because of misplaced confidence in Fernandez and Smith, and were victims of a mistake as to their rights and obligations and unconscious of any purpose to subject them to a personal responsibility.

9th. They received no notice of the entry of said final decree, and

10th. Complainants in the original bill showed no right to recover beyond the securities transferred to them by "Exhibit A."

11th. Nor had they recovered judgments at law.

It was then alleged that the sums of money sought to be recovered from them under said decree "have been before this paid by J. Fernandez & Co. to the complainants" through the latter's representative, which knowledge had come to Cerecedo Brothers since the decree and could not have been obtained before even by exercise of diligence, and that, even if still due, the money should be collected from J. Fernandez & Co. as a partnership and entity.

The bill of review then closed with the usual prayer that the original decree be reviewed and set aside, that complainants be allowed to defend in the original suit, and that meantime the execution of the original decree be enjoined. They offered to give a bond for the protection of the original complainants, and to pay the costs incurred in that suit. There was also a prayer for process, which named the firm of J. Fernandez & Co. as defendants, but the court will notice that no process was ever served on them, nor did they ever appear or take any part in the subsequent proceedings; hence were never before the court in the review proceedings.

The demurrer of appellants to the bill of review as first filed remained applicable to the same as amended, and thus the pleadings stood and remained (for reasons which need not here be dwelt upon) until the summer of the year 1907, when, a change of judges having taken place, the cause was again taken up and argued, both upon the demurrer to the bill of review and the plea to the jurisdiction under the original bill, and, on the 1st day of June, 1907, an opinion was rendered, overruling both the demurrer and the plea (pages 41, 42). On the 22d of the same month appellants answered the bill of review (pages 42-45), but Cerecedo Brothers did not proceed further until the 31st day of March, 1908, when they filed a replication to the answer to the bill of review and a demurrer to the original bill (pages 45, 46). A few days later, April 3, 1908, an entry in the open court proceedings shows that counsel for both parties united in a request which resulted in the following (pages 46, 47):

> "It appearing from the record that the pleadings at the present time stand upon a demurrer to the original bill and an answer and replication to the bill of review, making an issue in the latter, counsel for both parties to this bill of review unite in requesting the court to order the suspension of further proceedings in the original suit until the determination of the equities raised by the bill of review, and it appearing to the court that such request is in accordance with the rule of orderly pleading and that that part of said order of June 22, 1903, which opens the final decree in the original suit was improvidently made at that stage of the case, it is hereby ordered that further proceedings in the original suit be suspended and the effect of that part of the order last aforesaid, opening the said final decree herein, be vacated until the final determination of the questions raised by the bill of review and that the issue made upon said bill of review stand for hearing before the court at such early day as the court may be able to hear the same.
>
> "It is further hereby ordered that the final provision of said order of June 22, 1903, consolidating said original suit with this bill of review and order-

> ing the two to be tried together, be hereby vacated and the clerk is directed that the papers and proceedings in said causes be separated; and that the complainants in the original suit take no action toward the execution of said final decree therein until a final decree shall be rendered in this proceeding."

No trial, however, seemed to be forthcoming, and by the 30th day of October, 1908, counsel for complainants in the bill of review had evidently changed his mind as to the merits of his other points, as the court on that day at his request caused the following entry to be made in the journal of open court proceedings (page 47):

> "Although a hearing was set for this date in cause No. 147 entitled as above, before proceeding therewith F. H. Dexter, Esq., counsel for complainant therein, requests that the argument of the issue involved remain in abeyance and that he be permitted to reargue the plea to the jurisdiction which was heretofore decided against him in the original case No. 6, Mayaguez, entitled as above, out of which the second case arose, and after consideration of the matter the court grants such motion and the argument is proceeded with, N. B. K. Pettingill, Esq., appearing in opposition thereto; and at the conclusion of such argument the court takes the matter under advisement, it being understood that the respective counsel in addition to their oral argument also submit their briefs on file in that behalf."

The matter thus argued and submitted remained in the bosom of the court from that time until the 1st day of February, 1909, when an opinion was filed, reversing its former conclusion and holding that the original bill must be dismissed for want of jurisdiction in the court to render a decree for want of necessary diversity of citizenship in the parties (pages 48, 49). A final decree, in accordance with that opinion, was afterwards prepared, and signed and entered on the 9th day of February, 1909 (page 50). The open court proceedings of that day further show that ap-

pellants presented their petition of appeal with their appeal bond, obtained the allowance of their appeal and the approval of their bond, and filed the latter, all during the session of that day, thus avoiding the necessity of any citation, and bringing all the parties on the opposite side before this court on this appeal (page 50). The petition of appeal and bond follow the journal entry (pages 51, 52).

Assignment of Errors.

The assignment of errors are as follows:

I.

The court erred in granting the petition to file said bill of review, and in allowing the same to be filed by its order of June 22, 1903.

II.

The court erred in ordering at the same time aforesaid the final decree in said original suit to be opened up, and allowing complainants in said bill of review to plead to said original bill before the issues raised by the bill of review had been litigated and determined.

III.

The court erred in overruling the demurrer filed to said bill of review by the defendants thereto who are now appellants.

IV.

The court erred in entering its final decree sustaining said bill of review as sufficient to set aside the final decree upon said original bill, and in dismissing said original bill for want of jurisdiction.

V.

The court erred in sustaining the plea to the original bill, questioning the jurisdiction of the court.

VI.

The court erred in not entering a final decree dismissing the bill of review for want of proper averments to sustain it and establishing the validity of the final decree in the original suit.

In support of the foregoing assignment of errors, somewhat elaborated as they may be by subsequent statement, we present the following

ARGUMENT.

POINT I.

The Court Below Should Have Refused Permission to File the Bill of Review Because the Limit of Time had Already Elapsed.

There is ample authority to support the proposition that a bill of review must generally be filed within the time fixed by law for the taking of an appeal or writ of error.

Thomas *vs.* Harvie's Heirs, 10 Wheat., 146.
Central Trust *vs.* Grant L. W'ks, 135 U. S., 207.

The time for taking such appeal or writ from the District Court of the United States for Porto Rico to this court is two years.

Allen *vs.* So. Pac. R. Co., 173 U. S., 479.
Royal Ins. Co. *vs.* Martin, 192 U. S., 149.
Rev. Stats. of U. S., secs. 1008, 702.

The record in the present case shows that the final decree upon the original bill was entered on *June 8, 1901;* that the *petition for leave* to file the bill of review was filed on April 6, 1902, but that counsel did not obtain any action of the court thereon, nor was the bill of review actually filed until *June 22, 1903*—an excess of *fourteen days* over the two-year limit.

The filing of the *petition for leave* was not enough—*non constat* that the granting thereof would ever be requested. The petition for leave to file not having been called to the attention of the court and submitted for its consideration, it cannot be contended that the delay was the act of the court. Furthermore, when action was eventually taken by the court counsel did not even ask for or obtain an order that the allowance to file should be considered *nunc pro tunc*.

For the convenience of the court in applying authorities to the case at bar, bearing upon the contention that the bill of review was not filed in time, it is deemed proper to direct attention in this connection to a consideration of the character of the bill of review in two important phases, namely:

(A) Was it based *solely* upon "errors apparent on the records;" or

(B) Was it based partially upon alleged newly discovered evidence?

If based solely upon "errors apparent on the record," the bill of review could have been filed within two years as a matter of right and without any permission asked of the court.

Rieker *vs.* Powell, 100 U. S., 104.
Webb *vs.* Pell, 1 Page Ch., 564.
Hoffman *vs.* Knox (C. C. A.), 50 Fed. R., 484.

It is contended that the bill of review involved in this cause not only does not fall within class (A), but also that the bill of review itself, as interpreted by the conduct of counsel who submitted it, falls within a class requiring the leave of court as a necessary prerequisite to its being filed.

A perusal of the bill of review itself discloses an attempt on the part of the pleader to set up a class of allegations embracing charges both of "error apparent on the record" and claims for relief clearly not apparent on the record and alleged to be supported by "newly discovered evidence."

There is one paragraph which sets up an alleged want of employment or authority in counsel who claimed to represent the complainants in the bill of review as defendants in the original suit, and there is another paragraph which sets forth certain alleged newly discovered evidence.

Waiver of Any Right to File Without Leave of Court.

As Cerecedo Brothers did not see fit to file their bill as a matter of right solely for errors apparent, but inserted certain other grounds and awaited the permission of the court for its filing, what was the effect of that choice of courses upon their rights? This court has clearly decided that question, and held that it constituted a waiver of any right to file without leave of court, even as to alleged errors on the face of the record.

In the above case of Ricker *vs.* Powell, where the court below had refused leave to file the bill of review and the complainant therein had appealed, counsel took the position in this court that, as a part of the allegations referred to errors apparent, the bill could be filed as a matter of right; but this court said:

> "The application was for leave to file the bill *as a whole*, and not in parts; and if as a whole it required leave, the part which, if it stood alone, could be put on file without, must stand or fall with the incumbrances that have been attached to it. This bill,

> as a whole, could only be filed with leave, and consequently, as Ricker has by the form of proceedings adopted, voluntarily waived his strict legal right to file for errors of law without leave, *he must abide the rules applicable to cases where leave is required*" (Italics supplied).
>
> Ricker *vs.* Powell, 100 U. S., 104, 110.

The parties presenting their bill of review are, therefore, bound by the course of action they elected to pursue, whether it was legally necessary or not. If they had been content to depend upon the alleged errors apparent on the record, they could have filed their bill of review in April, 1902, when prepared and attached to the petition, without waiting for leave, which would have been in ample time. But, as they elected to seek permission and allowed the two years to expire before they obtained it, they were, under the principle announced in the Ricker case, *supra*, and the reasoning of the Thomas case in 10 Wheaton, too late to obtain a review of the decree in respect to the alleged errors apparent on the record. The reasoning of Justice Washington in the Thomas case is so conclusive as to warrant its repetition here:

> "These principles seem to apply, with peculiar strength to bills of review, in the courts of the United States, from the circumstance that Congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies, by appeal and a bill of review, so apparent, that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former. For it is obvious that, if a bill of review to reverse a decree, on the ground of error apparent on its face, may be filed at any period of time beyond the five years limited (at that time) for an appeal, it will follow that an original decree may, in effect, be brought before the Supreme Court for re-examination, after the period prescribed by law for an immediate appeal from such decree, by appealing from the decree of the Circuit Court, on the bill of review,

> In short, the party complaining of the original decree would, in this way, be permitted to do indirectly what the act of Congress has prohibited him from doing directly" (page 150).

Therefore, we submit, so far as the alleged errors apparent on the face of the record are concerned, the court on the 22nd day of June, 1903, had no discretion in the matter but was without *power* to grant the application of Cerecedo Brothers to review or set aside the decree in those respects.

This proposition is made still clearer by applying the analogy above suggested between bills of review and appeals or writs of error. The *power* in the one seems to be no greater than in the other, and it has been repeatedly held that, after the sixty days provided by statute for supersedeas has elapsed, there is no power in the court to grant it even by a *nunc pro tunc* order, and that, after the last day of the two years limited for appeal or writ of error, the right thereto has lapsed, even if the petition therefor has been filed and any part of the proceedings *less than the whole* have taken place.

> Credit Co. *vs.* Arkansas C. R. Co., 128 U. S., 258.
> Fowler *vs.* Hamill, 139 U. S., 549.
> Sage *vs.* Central R. Co., 93 U. S., 416.
> Kitchen *vs.* Randolph, 93 U. S., 86.

In response to a suggestion that the rule was a flexible one, hence should not be modified by limiting the time in pursuance of the policy of Congress in still further restricting the period for appeal, Judge Baker of the Sixth Circuit, then District Judge in Indiana, enforced the logic of the rule in the following language:

> "The reason of the rule, however, applies with the same cogency, under the present statute as it did under the prior statutes. When a party has slept on his rights until he has lost his right of appeal, why should he be permitted to disturb the decree by a bill brought in the court of original jurisdiction? If the

> period of six months is regarded as sufficient for suing out *and perfecting* an appeal, why should it not be regarded as ample for bringing a bill of review? *'Interest rei publicæ ut sit finis litium.'* Failure to file the bill within the time allowed for an appeal constitutes such negligence as will toll the right to bring it" (italics supplied).
>
> Copeland *vs.* Bruning, 101 Fed. Rep., 169.

For the foregoing reasons, we believe the court will be bound to hold that the lower court had no power, at the time of its order allowing the filing of the bill of review, to consider the grounds for such review which referred to errors apparent on the record of the original suit.

Alleged Errors Not Apparent.

Did the allegations made in the bill of review touching matters not apparent on the record add anything to the power of the court? We submit that it did not.

While it is true that, as hereinbefore stated, two years may not be the limit of time under certain circumstances for the filing, by permission, of bills of review for newly discovered evidence, any power to extend the time must arise from allegations showing a reason therefor; or, as expressed in one case, the usual limit of time will be applied "unless some special reasons exist *to excuse the delay*" (italics supplied).

> Rector *vs.* Fitzgerald (C. C. A.), 59 Fed. Rep., 808, 812.

The principle as expressed by Mr. Justice Story in his work on Equity Pleading has been referred to and approved in many decisions:

> "In the next place, another qualification of the rule, quite as important and instructive, is, that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negli-

gence in this respect, that destroys the title to the relief."

Story's Equity Pleading (10th Ed.), Sec. 414.
Rubber Company *vs.* Goodyear, 9 Wall., 805.

If, then, the complainants in this bill of review allowed more than two years to elapse before permission to file it was obtained, the burden was upon them "to excuse the delay" by sufficient allegations in their bill for that purpose, else there was nothing to invoke the *power* of the court. The extent to which this burden goes has been well fixed:

"The complainant's case, in another respect, is, in my judgment, fatally defective. The complainant does not show, by a statement of facts and circumstances, that he could not, by the use of reasonable diligence, have discovered the new matter in time to have made use of it on the final hearing. It is true, he declares, both in his petition and affidavit, that that is the fact, but his statement in that regard is merely his conclusion or opinion. He gives no facts. His opinion is not evidence. The applicant, in such a case, must set forth the facts and circumstances so that the court may judge for itself whether or not reasonable diligence has been used. Simply stating his conclusion or judgment is not evidence and amounts to nothing at all. The cases are uniform on this subject. (Citing cases.)"

Traphagen *vs.* Voorhees, 15 N. J. Eq., 11, 19.

To the same effect see—

Long *vs.* Granberry, 2 Tenn. Ch., 85.
Appeal of Priestley, 127 Pa. St., 420.

There can be no pretense that Cerecedo Brothers brought themselves within this rule, under any reasonable construction of it. In the first place, it appears that everything alleged in the bill of review was known to them in ample time, because the bill itself was prepared and *ready to be filed* more than a year before it was filed and less than *one* year after the decree. The delay in filing was purely a case of inactivity.

We have already argued, and think we have shown, that the cause of the delay was immaterial, unless the excuse therefor was duly alleged and accepted as sufficient by the court, while here no excuse for delay *beyond the two years* is even suggested. And we have also argued that, logically, the filing of the *petition for leave* within the time can have no legal effect. This contention is supported by a decision in a comparatively recent case, wherein an appeal had been taken to the United States Court of Appeals, which, at its February term, 1899, reversed the decree theretofore entered, and by its mandate directed the entry of a different one. The mandate was obeyed by the entry of a second final decree on the 22d day of March, 1900. The bill of review was filed in the trial court on the 3d day of December, 1901. In considering the bill under such circumstances the Circuit Court states the following views:

> "Without attempting to decide the issues, the question at the threshold of the controversy is, is the petitioner, on the face of the bill, entitled to maintain a bill of review? It will be seen the bill was filed two years and seven months after the rendition and enrollment of the decree of the appellate court, and nearly a year later (November term, 1902) permission of the appellate court thereon was obtained. Leave to file a bill of review can only be obtained from the court in which the decree is rendered and enrolled—in the case at bar, the Circuit Court of Appeals; hence this bill *must be taken to have been filed subsequent* to the November term of that court, at which term *such leave was granted*. * * *
>
> "A bill of review for matters of law apparent on the record must be filed within the time allowed for an appeal, and for newly discovered matters should be within a reasonable time."
>
> Camp Mfg. Co. *vs.* Parker, 121 Fed. Rep., 195.

Therefore there was absolutely no showing authorizing the exercise of discretion by the court below in favor of the filing after the two years had elapsed.

Alleged Grounds Frivolous.

It is submitted that both alleged grounds, outside of those referring to the original record itself, were nothing less than frivolous. Let us examine them.

First. The allegations touching their reasons for not making a defense in the original suit (Amended Bill, page 37).

These allegations amount to nothing more than the admission of their own negligence and ignorance of the law. They admit they were duly served with process, but did not employ a lawyer because they were advised by their co-defendant, the firm of J. Fernandez & Co., that *they* had employed an attorney and, as Cereceda Brothers were only nominal parties, they would need no separate defense; therefore, as they "believed and expected," Fernandez & Co. and the latter's attorney would make all the defense necessary, they paid no further attention to it. These were all matters of law which they are conclusively presumed to know, and the negligence they set up and the deceit practiced upon them, if any, were the negligence and deceit of their own partners and co-conspirators toward them—not of the complainants in the original bill, appellants here, or any one connected with them.

The insufficiency of such circumstances to authorize any interference or relief has often been explained by the courts, from whose decisions we cite the following:

> "* * * the complainant relied on the fact that he never saw the answer or cross-bill, and did not know their contents. This is no ground for allowing him to repudiate them now. It is not alleged that he would have placed his defense on any different ground had the answer and cross-bill been read by him. Indeed, they were drawn in pursuance of his advice received from his counsel and acquiesced in by him. His not having sworn to his answer, or even read it, is no excuse. It was his duty to have known its contents, if not to have verified it. If his

> counsel failed to make as good a defense for him as they might have done, it was his misfortune and cannot be rectified after the passing of the decree. Litigation would never come to an end if parties were permitted thus to shift their entire ground of attack or defense after finding where the pinch of the cause lay. They must be estopped by the record, unless they can show that they were the victims of fraud or mistake."
>
> Putnam *vs.* 22 Wall., 65.

And, of course, the fraud or mistake referred to must be the result of actions or concealment of the *opposite party*.

> "It is the duty of litigants to be in court, either in person or by attorney, when their cases are called, and to see that the proper steps are taken for the protection of their rights. It is not ground for a bill of review that a case is taken up and decided in the absence of counsel. It was so decided in Quarrier *vs.* Carter, 4 Hen. & M., 242, and Wiser *vs.* Blachly, 2 John. Ch., 490. The means of knowledge as to the steps being taken in the suit were within easy reach of complainant and his counsel. No effort was made or device resorted to on the part of respondents and their counsel to conceal the action of the court, or to keep the other side in ignorance thereof. The proposition that complainant may rely for relief upon the negligence of or misinformation received from his counsel, or of those to whom such counsel has entrusted the care and attention to his professional business, is not sound, and is not supported by authority."
>
> Tighlman *vs.* Werk, 39 Fed. Rep., 680.

And, we submit, the same conclusion should be reached where the reliance is upon counsel of a co-defendant supposed to be caring for the common interest, as Smith said he could do according to their own allegations. The following was very nearly a parallel case:

> "An answer on oath was waived, the defendants Vanderkemp and Evans probably supposed the solic-

itor for Schermerhorn could put in an answer for them, and make a defense for all, as he had agreed to do. Their solicitor, therefore, took no notice of the papers, which appear to have been regularly served upon him, from time to time, down to May 10, 1839, when he waived the service of any other papers in the cause upon him. By relying upon Schermerhorn to put in an answer for them, as well as for himself, and neglecting to have his solicitor substituted in place of Chandler, they have remained in ignorance of the proceedings in the cause, and have lost the opportunity of denying the authority of Wood to make the alleged agreement as sub-agent. They have also lost the right of appealing from the erroneous decree of the vice-chancellor. * * * And a bill of review must be brought within the time allowed by law for appealing from the decree."

Boyd *vs.* Vanderkemp, 1 Barb. Ch., 273, 287.

See the following cases of similar import:

Franklin *vs.* Wilkinson, 3 Munf., 112.

Head *vs.* Perry, 17 Ky., 253.

Winchester *vs.* Winchester, 38 Tenn., 460.

The authority of a member of the bar to appear for a client is presumed from the fact of his doing so:

Osborne *vs.* Bank, 9 Wheat., 739.

Bounifield *vs.* Thorp, 71 Fed. Rep., 924.

And there is really nothing in the allegations to show positively that Cereedo Brothers did not expect Smith to appear for them jointly with the other defendants. The important thing was, impliedly, that the others were to pay the fee and Smith would get nothing extra for representing them as they were "nominal parties." In any event, the record shows that they were duly served with subpœna and whether they were represented by counsel or not is immaterial as affecting the result.

Second. The allegations touching payment of the alleged indebtedness by J. Fernandez & Co. to a representative of Jaffé Bros. & Co. (Amended bill, page 39.)

It is necessary to peruse this allegation carefully. It is in the following words:

> "And your orators aver that the said sums of money so sought to be recovered against them have been before this paid by J. Fernandez & Co. to the complainants in said (meaning the original) cause to and through their representative and duly constituted attorney-in-fact, Benjamin Delgado de Lemos, who received the said payment and certain properties in lieu thereof for and in behalf of the said complainants. And your orators say that this information has come to their knowledge since the said decree, and could not have been obtained before by the exercise of due diligence."

It will be seen at a glance how far this vague and general statement comes from fulfilling the conditions required by the authorities hereinbefore cited above, namely:

Story's Equity Pleading (10 ed.) section 414.
Rubber Co. *vs.* Goodyear, 9 Wall., 805.
Traphagen *vs.* Voorhees, 45 N. J. Eq., 41, 49.
Long *vs.* Granberry, 2 Tenn. Ch., 85.
Appeal of Priestley, 127 Pa St., 420.

The use of the phrase, "have been before this paid," leaves us even in doubt whether it was intended to allege that such payment was made before or after the entry of the final decree. It *can* mean but one of two things: either that the payment was made before the decree and information thereof received after that date, or that the payment itself was made after the decree.

If the former was intended, that is, that payment was made before the decree and the information of it received after the decree, we submit that, according to other allegations of the bill of review, the relations between Cerecedo

Brothers and J. Fernandez & Co. were admittedly of such confidence and intimacy that the former could not have remained in ignorance of such payment even up to the entry of final decree, except as the result of gross negligence or intentional avoidance of knowledge. We claim further that as partners, whether general or special, Cerecedo Brothers were legally chargeable with knowledge of payments made by the firm of J. Fernandez & Co.; and that, as they had admittedly left the defense of the suit in the hands of J. Fernandez & Co. and Attorney Smith, the negligence of the latter in failing to set up that defense in the suit, if such defense in fact existed, became the negligence of the former, who had voluntarily intrusted their interests to the latter.

Boyd *vs.* Vanderkemp, *supra*.

Wiser *vs.* Blachly, 2 John. Ch., 488.

In the latter case Chancellor Walworth said:

> "It was the duty of Vail (a surety) to have inquired of his principal as to every ground of his defense respecting the notes with which he was especially charged. The principal knew perfectly well every circumstance attending this award; yet he omitted it altogether in the whole progress of his defense, and even charged himself with one of the notes. It is impossible to listen to the suggestion of the surety that he has, for the first time, heard of such an award."

The mere fact that appellees did not agree to pay Attorney Smith, except through the partnership of J. Fernandez & Co., of which appellees were limited partners, did not prevent said Smith from being their agent or prevent the knowledge acquired by him from being imputed to appellees.

Armstrong *vs.* Ashley, 204 U. S., 272.

If, on the other hand, it was intended to allege that the payment itself was made *after* the decree was enrolled or

entered, the matter is clearly not the proper subject of relief by bill of review. Relief under such circumstances must be sought by other means. The form of the statement of the rule used by Story, and so often repeated, that the evidence alleged must be "new matter" which "the party by reasonable diligence could not have known" previous to the decree precludes the idea of a matter or fact not even in existence; because, if not in existence, why apply the criterion of "reasonable diligence"? No degree of diligence can discover the non-existent.

Again, the character of the newly discovered evidence is sometimes described as being such as would have been sufficient to modify the decree had it been produced in testimony. Such a criterion naturally presupposes the existence of the fact at a time when it could have been so produced. And, finally, most conclusive of all is the consideration that a fact occurring subsequently could have no proper place in the determination of issues when made by the parties and in view of which a decree is drawn. In the last analysis the *raison d'etre* of all bills of review is *error*—something done by the court which it should not have done during the progress of the cause or in the final decree; and error cannot be committed by failing to consider something which does not exist.

There has been some confusion in the decisions, caused by a failure of the courts to express with exactness the idea in the mind. Although the cases are few in which this exact question has arisen for determination, most of the doubtful expressions being the result of a desire to formulate a general rule apart from the particular facts of the case. But we are not without some clear statements logically deduced. For example, in the learned and exhaustive opinion of Mr. Justice Baldwin, sitting at circuit, in the case of Poole *vs.* Nixon, specially reported in Book 9, L. C. P. edition, of the U. S. Supreme Court Reports, at page 312, where he says:

the court could derive authority "to excuse the delay" in its filing beyond the limit of time for appeal.

The objections of appellants to its filing should therefore have been sustained and permission refused.

Point II.

Court below should have required performance of decree before permission to file Bill of Review was granted.

The appellants also objected to permission being given to file the bill of review until the decree had been performed—that is, until the amounts adjudged to be due appellants had at least been deposited in the registry of court so as to be under its absolute control. The court relieved the petitioners from that obligation for reasons thus expressed (page 25):

> "It is urged that the bill for review should not be entertained until the payment of the judgment, which is for money. Generally, one asking to file a bill for review must show performance of the decree. The reason is that the opportunity by delay should not be afforded to parties by such bills. But why require payment if it be true that payment has already been made? It is true this would only apply in this case to Jaffé Brothers & Company, but whether the court will require compliance with a decree before entering a bill for review depends upon the circumstances of the case. It is an administrative and not a jurisdictional rule. Davis *vs.* Speiden, 104 U. S. Reports, 84."

In other words, the judge held that such requirement was a matter within his absolute discretion. Is that the law? We believe not. The contrary seems to have been long settled.

So long ago as Chancellor Kent's time the requirement was considered an ancient and well settled rule:

and that syllabus is strictly supported by the decision itself. In fact the quoted phrase is taken from the above case of Wiser *vs.* Blachly, which is cited with approval for that purpose.

Davis *vs.* Speiden goes no farther than to hold, with reference to the settled rule, that "questions touching obedience to its requirements were not considered as matters of strict right, but as governed by *sound* discretion." That does not mean, we submit, an arbitrary discretion, such as was exercised by the judge below in this case, but a *judicial* discretion, the appeal to which must be based upon some showing of "poverty, want of assets, or other inability."

It will further be seen, by reading the above extract from the judge's opinion, that even he was at a loss for an excuse for not at least requiring the performance of the decree so far as Hinne & Co. were concerned.

If the discretion of the judge below was absolute this court, of course, will not review it; if it was judicial we submit that it was abused, as no foundation whatever was laid or pretended to be laid for its exercise.

Point III.

Court erred in annulling final decree and dismissing Original Bill for want of jurisdiction.

If this court concedes the correctness of the conclusion reached by us under the preceding heads, no other point need be considered, because, if the permission to file the bill of review should have been denied, the original decree remains in full force and a reversal, with a mandate to the lower court to vacate the decree of February 9, 1909, and the order of June 22, 1903, and to enter a decree striking the bill of review from the files follows as a matter of course.

But if this court is able to avoid the logic of our previous contentions, and to hold that the action of the court below

in permitting the filing of the bill of review should not be reversed, then it will, we presume, next inquire whether the jurisdiction of the court below was seasonably and properly questioned, and, if so, as to the jurisdiction of the court below upon the original bill.

Jurisdiction Not Seasonably Raised.

At the very threshold of the argument on jurisdiction, the appellees must meet and overcome the potent infirmity incident to their failure to have raised the question until after the expiration of the time for appeal from the final order of June 8, 1901.

We are well aware of the rule, often announced and applied, that where the jurisdiction of a Federal court is doubtful that doubt will be resolved against the jurisdiction.

But this latter rule, we submit, is limited to cases where the question is seasonably raised, before defendants have submitted themselves to the jurisdiction and rights have been fixed. In the case at bar the defendants not only appeared and argued an application for the appointment of a receiver and allowed the case to proceed to final decree in the original suit, but even allowed the time for appeal to expire before they put this contention to the test. In such a case every intendment should be taken in favor of jurisdiction, and so it has been held by this court. In one of the early cases the following language was used:

> "The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the Circuit Courts of the United States. In Kempe's Lessee *vs.* Kennedy, 5 Cranch., 185, this court say: 'The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.'

> "And again in the case of McCormack *vs.* Sullivant, 10 Wheat., 199, in answer to the argument that the proceedings were void, where the jurisdiction of the court was not shown, the court say: 'The argument proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.'"
>
> Kennedy *vs.* Bank, 8 How., 586.

The language in *Ex Parte* Watkins, 3 Pet., 193, is even stronger, and Chief Justice Marshall there said that an "*apparent want of jurisdiction can avail the party only on a writ of error*," while in a comparatively recent case Mr. Justice Harlan, speaking for the court, thus described the result of the earlier cases:

> "These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and *could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*" (Italics supplied.)
>
> Dowell *vs.* Applegate, 152 U. S., 327, 340.

Under the head of Point V, below, we shall have occasion to support by authority the proposition that not all errors

which could be corrected by appeal can be reached by bill of review; and, in view of the language of the foregoing decisions, it is contended that a question of mere doubt as to the jurisdiction is one of those which cannot be corrected by bill of review, particularly, as in the case at bar, where the question of jurisdiction was not seasonably raised.

JURISDICTION.

This question was raised in two ways: First, by the allegation of want of such jurisdiction contained in the bill of review (page 38), and, second, by a plea to the original bill filed on the same day that the present appellants demurred to the bill of review (page 34). The two allegations were substantially the same, yet we believe orderly procedure required that the sufficiency of that allegation in their bill of review, as raised by our demurrer, should have been first considered. For, until our demurrer had been overruled and the bill of review declared sufficient, we believe the court could not properly order the opening of the original decree and allow complainants in the bill of review to make defense thereto, and that, if our demurrer had been sustained and the bill of review dismissed, the original decree would have remained continually in force unaffected by this attempt to attack it.

Hoffman *vs.* Knox (C. C. A.), 50 Fed., 484, 489.
Copeland *vs.* Bruning, 104 Fed., 107.

The allegation attacking the jurisdiction was in the following words:

> "That this court did not have jurisdiction of the original cause and bill of complaint, for the reason that according to the allegations of said bill all the parties plaintiff were foreign subjects, and all of the parties defendant were citizens of Porto Rico, there being no citizen of the United States or of a State of the United States a party defendant, and no other or

> sufficient ground or reason for the jurisdiction of this court is in the said original bill set forth sufficient to give this court jurisdiction of the said cause" (page 38).

The bill of review states correctly that in the original bill all the parties complainant were alleged to be subjects of foreign States, either England or Germany, and all the parties defendant citizens of Porto Rico. It is also true that the original bill was filed before the act of Congress of March 2, 1901, enlarged the jurisdiction of the court below as it has since remained, and that at the time of the filing of the bill the jurisdiction of that court was fixed and limited by section 34 of the Act of Congress of April 12, 1900, commonly known as the "Foraker Bill," which established civil government in Porto Rico. That section enacted that the District Court of the United States for Porto Rico "shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

It is maintained, in this connection, that—

(*a*) The court below had jurisdiction of a controversy between citizens of foreign countries and the defendant noncitizens of any foreign country.

(*b*) The court clearly had jurisdiction under the act of March 2, 1901 (31 Stat. at L., 953), when it passed its final decree of June 8, 1901, and any possible lack of jurisdiction was cured by said act of Congress, the question of jurisdiction not having theretofore been raised.

(*c*) The original bill also involved a Federal question.

Proposition (a)

We are well aware of the many decisions of this court holding that citizenship in a *Territory* is insufficient to confer jurisdiction upon Federal courts in the States under that clause of the statute referring to "citizens of different States."

But even if the question be open, which is denied, we submit there is a valid argument in favor of sustaining, upon its merits, the jurisdiction of the court by reason of the citizenship of the parties. It is to be borne in mind, as above suggested, that the clause of the statute defining jurisdiction of Federal courts, which is here involved, is not the "controversy between citizens of different States," but the "controversy between citizens of a State and foreign states, citizens or subjects." On one side we have the "foreign subjects," cannot "citizens of Porto Rico" be held in a broad sense to be citizens of a State within that provision?

In determining this question the fact must have some bearing that the native "citizens of Porto Rico" have not been admitted as a body to be citizens of the United States, as has been done in each previous instance of the acquisition of territory by our Government. They owe this country allegiance, yet are not citizens and cannot become such; they have lost their allegiance to any foreign country, yet are not aliens (Gonzalez *vs.* Williams, 192 U. S., 1). In such case it seems to us the analogy of former decisions fails, and differing conditions call for the application of new principles and a different conclusion. This court has already felt the force of a similar situation, where it refused to apply strictly a construction of the removal statute, certainly well settled as between the Constitutional Federal courts and the courts of the States (Garrozi *vs.* Dastas, 204 U. S., 64, 73). If the Portoricans are not foreigners and are not citizens of the United States, the *only* citizenship they have, being "citizens of Porto Rico," it would seem not too broad a construction

to conclude that Porto Rico might be designated as a State, not in a constitutional sense, nor even in a political sense, but simply as designating a body politic composed of citizens having a special status, such as might reasonably be within the intendment of Congress when it passed the law applying such language to Porto Rico.

Railroad Co. *vs.* Tennessee, 153 U. S., 486, 502.

Proposition (b)

THE COURT CLEARLY HAD JURISDICTION UNDER THE ACT OF MARCH 2, 1901 (31 STATS. AT L., 953), WHEN IT PASSED ITS FINAL DECREE OF JUNE 8, 1901, AND ANY POSSIBLE LACK OF JURISDICTION WAS CURED BY SAID ACT OF CONGRESS, THE QUESTION OF JURISDICTION NOT HAVING THERETOFORE BEEN RAISED.

The third section of the act above cited reads as follows (31 Stats. at L., 953):

> "That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

The court will note that the bill in the original cause was filed in November, 1900; that the hearing on the application for a receiver, at which all parties were represented, was held in the month of December following; that in the month of February, 1901, Mr. Smith, as representing the defendants, asked for and obtained from counsel for complainants (appellants) a stipulation to extend their time for pleading to the bill; that the order *pro confesso* was entered on the

23d day of February, 1901, and might have been opened during the thirty days thereafter—that is, up to the 25th day of March—while the above amendment to the law was passed March 2, 1901, and the final decree was not actually entered until the following June, more than three months thereafter.

Under these facts we submit that the amendment to the law—under which not even counsel for the opposite parties will dispute that jurisdiction would have been given—cured any lack of jurisdiction at the time the bill was filed.

In the case of Pacific R. Co. *vs.* Ketchum the question of jurisdiction of the court below was raised upon the appeal to this court, and upon the precise point now under discussion. In the language of this court:

> "The objection is that as Vail (and others) were all citizens of the same State with Ketchum and the several parties who in the progress of the cause were admitted as coplaintiffs with him, the suit was not between citizens of different States and, therefore, not within the jurisdiction of the Circuit Court."

The court then quotes the statute, and refers to the right and custom to range the parties on one side or the other according to their real interest, and then continues:

> "For the purposes of this appeal, we need not inquire when the Circuit Court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree when rendered was consented to, it is enough, for the purposes of this appeal, if the record shows that when the consent was acted on by the court, jurisdiction was complete. Consent cannot give the United States jurisdiction, *but it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained.*" (Italics supplied.)
>
> Pacific R. Co. *vs.* Ketchum, 101 U. S., 289.

The same question has been discussed and decided in two of the Circuit Courts of Appeals. In the earlier case the rights of complainants depended on the terms of a last will and testament, but the same had not been probated or otherwise proved at the time suit was brought. The court said:

> "Conceding that complainants had no right to the relief prayed until a last will had been probated, the court held that the bill would be sustained where the answer admitted said will had in fact been probated, although such probate had not taken place until twenty-four days after the bill of complaint had been filed;"

which decision was sustained by the appellate court, and Justice McKenna, of this court, specially concurring, said:

> "The answer, however, brought into the pleading the necessary condition of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. *'It was sufficient if the court had jurisdiction at the time the decree was rendered.'* (Italics supplied.)
>
> Richardson *vs.* Green, 61 Fed. Rep., 423, 431, 436.

In the other case a bill had been filed which showed no diverse citizenship, but afterwards it was amended so as to make the citizenship diverse, and Justice Lurton, now of this court, citing the Ketchum case, said:

> "The jurisdiction of the court seems never to have been brought to the notice of the court below until after an amended and supplemental bill had been filed by complainant, and the cause about ready for hearing. In considering this question of jurisdiction, we shall therefore consider the status of the cause as it appears upon both the original and amended bills. *If the court had jurisdiction at the time a motion was first made to dismiss for want of jurisdiction, and had jurisdiction when it entered the decrees appealed from*, it is of no moment, on this

record, how long it had had jurisdiction, or at what prior stage of the cause it was acquired." (Italics supplied.)

First Nat. Bk. *vs.* Radford T. Co., 80 Fed. Rep., 569.

See also—

Hoffman *vs.* Knox, 50 Fed. Rep., 484, 471.

In the case at bar, of course, there was no express consent to any action after the submission of the application for a receiver, but we submit that the failure of the defendants to defend and their permitting a final decree to be entered upon a *pro confesso* was equivalent, so far as its effect as an estoppel is concerned. And particularly so upon their attempt to review the decree in the present manner, since, even upon a direct appeal from a decree entered in that way, the only question open to consideration would be the sufficiency of the bill to support the decree as rendered.

Masterson *vs.* Howard, 18 Wall., 99.

The only case we have found involving a subsequent law is

Pennsylvania *vs.* Bridge Co., 18 How., 421.

The conclusion is, therefore, irresistible that whatever doubt there may be with regard to the jurisdiction of the court when the suit was filed, the final decree, sought to be annulled, having been entered at a time when the court clearly had jurisdiction under section 3 of the act of March 2, 1901, and before the jurisdiction of the court was questioned, any such possible defect was cured and the action of the court below in annulling the decree for want of jurisdiction was erroneous.

Proposition (c)

THE ORIGINAL BILL ALSO INVOLVED A FEDERAL QUESTION.

If the court will read that part of the original bill of complaint, beginning with the first new paragraph on page 4 of the printed record and continuing to near the bottom of page 5, it will be seen that complainants referred to and set forth some of the provisions of the law governing "suspension of payments" which they claimed to be then in force and a proper construction of which they claimed would prevent defendants from completing the perpetration of the fraud they were attempting, and the intervention of the court was prayed for the purpose of enforcing compliance with that law and preventing defendants from further violating it by taking their property out of their hands and having it administered in accordance with said law. If that law was in legal effect a law of the United States, or, to speak more accurately, if it was an order or regulation having the force of law, promulgated by virtue of the authority vested by the Constitution of the United States in the President as Commander-in-Chief of the Army and Navy, then a case involving any right claimed under it would be a Federal question, in the sense of conferring jurisdiction upon a Federal court to hear and decide it.

The question of original jurisdiction of a United States court in any case on the ground that it involves a Federal question is to be distinguished from statutes governing appeals on similar grounds. We shall cite a few of the decisions of this court upon the limits of such *original* jurisdiction, as that is the point here involved.

One of the early decisions was by Chief Justice Marshall, wherein this Court said:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the

United States, whenever its correct decision depends on the construction of either."

Cohens *vs.* Virginia, 6 Wheat., 264, 379.

This general statement was further explained by the same Chief Justice a little later, as follows:

"The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

* * * * * * *

"If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action may be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. * * *

"We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, *forms an ingredient* of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." (Italics supplied.)

Osborne *vs.* Bank, 9 Wheat., 738, 822, 823, 824.

It is only necessary, in addition, to cite one of the recent expressions of the court:

"But the jurisdiction of the Circuit Court was not invoked on the ground of diverse citizenship—at least, not on that alone. The case presented was one arising under the laws of the United States. It was a suit

to enforce a special right given by those laws." And the court then cites certain acts of Congress."

Wyman *vs.* Wallace, 201 U. S., 230.

What, then, was the law regulating "suspension of payments," referred to and relied on in the original bill? It was alleged in that bill (page 3) that the firm of J. Fernandez & Co. went into suspension of payments in April, 1900. Major General George W. Davis, while Military Governor of Porto Rico, on the 21st day of December, 1899, issued his "General Orders, No. 224," which had the force of law in Porto Rico, and which was as follows:

"Upon the recommendation of the Judicial Board, it is hereby ordered as follows:

"I. Any merchant may make legal announcement of his having suspended payment, within forty-eight hours next following the judicial or extra-judicial demand for payment of an obligation due and payable by him.

"II. Within ten days thereafter it shall be his duty to file a sworn statement of his liabilities and assets, specifying the amount due to each creditor, same to be accompanied by a report of the causes which led to his embarrassment and the proposition he makes for settlement with his creditors.

"III. In the decree declaring the suspension of payment, the court shall appoint from among the creditors present, should there be any, or merchants residing in the locality or town nearest thereto, a syndicate (board of trustees) consisting of three persons who upon accepting the duty, shall become co-administrators of the merchant suspending payment.

"In the same decree a day and hour shall be fixed for the meeting of creditors. In no case shall said meeting be delayed for a longer term than two months.

"IV. The acceptance of the duty of trustees is compulsory on the part of creditors who are merchants of the locality, and any excuse not properly justified shall involve the loss of the amount due the party so refusing. Trustees shall receive compensation for

their services, and all expenses incurred by them in the discharge of their duties, shall be reimbursed. The amount of said compensation shall be determined at the first meeting of the creditors, and should the debtor or trustees disagree, the court having the case in charge, shall decide the point at issue without appeal. The payment of the expenses shall be authorized by the creditors at their meeting, upon examination of the accounts, and should there be any disagreement, the court shall decide the matter, said decision to be final.

"V. The duties of the trustees shall be: 1st. To intervene in all the transactions of the firm that has suspended payment, and report to the court all illegal proceedings, especially attempts to settle in any manner debts contracted before the suspension; 2d. To examine the books of the firm and duly report at the meeting of creditors the result of their examination; 3d. To examine also the statement of assets and liabilities and certify whether same agrees with the books; 4th. To give at the meeting all the explanations that may be called for regarding the debtor's situation, causes leading thereto, and his capacity or incapacity for business.

"VI. The creditors shall be called together by means of registered letters addressed to each. Said letters shall contain a memorandum of the firm's petition and the decree of the court calling the meeting of creditors, besides a printed copy of this order. The letters and memorandum shall be signed by the debtor and trustees present. The registration certificates at the meeting shall constitute evidence of the summonses sent out.

"VII. Those creditors who fail to attend the meeting shall be counted as negative voters for the concession of acquittals or respites, no matter to what class they may belong, excepting mortgage creditors.

"VIII. From the moment the suspension of payment of a merchant has been declared, no attachment of his property can be ordered, nor any incidental demand of whatever kind, looking to the nullity of the declaration of said suspension of payment, shall be admitted by the court.

"Proceedings relating to mortgages are excepted from the foregoing provision."

"IX. On the day of the meeting the court having jurisdiction shall admit all the creditors named in the written statement of the debtor, and other persons presenting obligations payable to them that are acknowledged on the spot by the debtor without opposition on the part of the trustees, and also the legal representatives of such creditors.

"In order to constitute the meeting the presence of creditors representing four-fifths of the liabilities shall be required.

"The meeting having been constituted, the articles under which it is held, as also the statements and reports presented by the debtor and trustees, shall be read, and after the latter have given such information as may be called for by the creditors or the court, the plan or proposal for a settlement or agreement shall be discussed and voted upon. For the approval of said proposal a vote of four-fifths the total liabilities and of two-thirds the creditors present shall be required. From the decision of the meeting there shall be no appeal; but the dissenting creditors may lodge their complaint, under bond, should they think that any act has been committed constituting an offence, as defined by the Penal Code.

"X. If the result has been favorable to the debtor, that is to say, if the proposal has been approved, the court shall order same to be posted in the usual places and announced in the Official Gazette.

"XI. Should the vote of the meeting be adverse to the debtor, the latter shall immediately be asked if he is willing to make an assignment and upon his signifying his willingness thereto, this point shall be discussed and decided by a majority of votes, same to consist of one-half plus one of the votes of the creditors representing two-thirds of the liabilities.

"The votes of absent creditors shall be counted as being cast in favor of an assignment.

"Only mortgage creditors shall be excepted, not being subject to any of the decisions, unless they participate therein by voting either in favor of, or against them. Said exception is limited to such cred-

itors as are entitled to especial compulsory proceedings under the mortgage law.

"The amounts due to mortgage holders who fail to attend the meeting or who do not take part in the decisions thereof, shall not be considered in determining the total of liabilities or in computing the vote in favor of, or against the debtor.

"XII. Should the assignment be approved by the creditors, the court shall immediately cause announcement thereof to be made in the manner above prescribed. At the same meeting three assignees or receivers shall be appointed, whereof two shall be elected by a majority as to amount, and one by the numerical majority of the creditors present who have not voted to form the majority as to amount.

"By majority as to amount is meant the largest sum represented by a vote; while the numerical majority has reference only to the number of votes, without regard to the total amount due them.

"XIII. No appeal shall be taken from the decision of the meeting of creditors regarding the admission of an assignment but same shall be carried into effect as provided by the Code of Commerce and the Law of Civil Procedure, in the matter of examination, classification and payment of the debtor's liabilities.

"XIV. In case the debtor should refuse to make an assignment or same should be rejected by the creditors, the court shall forthwith declare the former a bankrupt and deal with him accordingly.

"XV. However, should it be shown through a certificate of the trustees that from the sums collected by the debtor since the declaration of his suspension of payment, there is a sufficient amount in cash to cover all obligations due, and enough capital besides to meet all pending debts as they mature, the court shall order the trustees to settle such debts as are due, all other creditors being at liberty to take whatever action they may deem best for their interest, while the debtor shall be restored to the position he held before his suspension of payment was declared.

"XVI. Should a certificate be filed to the effect that complaint of fraud or swindle, has been brought and admitted, the proceedings in the matter of sus-

pension or assignment shall be held in abeyance until a final decision shall have been given thereon.

"XVII. The District Court instituted by General Orders, No. 114, current series, these Headquarters, shall have jurisdiction in all questions arising under this order.

"XVIII. The present order has no retroactive effect. This order shall go into effect on January 1, 1900."

The original bill was filed November 19, 1900.

The foregoing, together with other military orders, was theretofore continued in force as law in Porto Rico by section 8 of the act of Congress of April 12, 1900, hereinbefore referred to. It therefore either became a law of Congress by adoption or retained its original character of an order promulgated under the power vested in the President by the Constitution.

This is too plain to require argument and has been fully argued and decided in the opinions of this court from the early times:

Cross *vs.* Harrison, 16 How., 164.
Leitensdorfer *vs.* Webb, 20 How., 176.
The Grapeshot, 9 Wall., 129.
Tullock *vs.* Mulvane, 184 U. S., 497.

In *The Grapeshot, supra,* this court said:

"We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States."

So, if the military orders by which the Provisional Court in Louisiana was established and that Government carried on were in the exercise of the President's constitutional au-

thority, in like manner was the military order here in question.

Therefore, we need not have argued even that our rights depended upon the construction of this order. It is enough that it regulated the matters at the foundation of the bill. The distinction between the two classes of cases has been clearly drawn by Mr. Justice White in a recent case, wherein he said:

> "But the doctrine referred to has no application to a case brought in a Federal court *where the very subject-matter of the controversy is Federal*, however much wanting in merit may be the averments which it is claimed establish the violation of the Federal right. The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in their essence Federal, and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character." (Italics supplied.)
>
> Swafford *vs.* Templeton, 185 U. S., 487.

We submit, therefore, that the jurisdiction of the court over the original cause was not seasonably or properly raised by bill of review, and, even if so raised, the proposition is untenable for the reason presented in support of each of the three foregoing propositions designated (*a*), (*b*), and (*c*); and the action of the court below in annulling the final decree of June 8, 1901, and in dismissing the original bill for want of jurisdiction was erroneous.

Point IV.

Allegations and prayer of Original Bill warranted money judgment against Cerecedo Bros.

This proposition involves both the second and third objections made to the decree by the complainants in the bill of review, because it was not the theory of the original bill, nor the contention of counsel for the complainants therein, that Cerecedo Brothers and the other special partner, Victo Martinez, were liable for the indebtedness of the firm of J. Fernandez & Co. merely *because* they were such special partners. On the contrary, the contention was that the allegations of fraudulent diversions of assets contained in the bill made them responsible *in spite of* their being special partners. And so we believe the law to be.

The bill was drawn with the expectation that complainants would be obliged to enforce their preferred claim against the securities which had been promised them, and, by the receivership, seek to recover the goods which had been fraudulently withdrawn from the firm assets. The bill alleged that at the time the petition for suspension of payments was filed their schedules showed stocks of goods valued at some 73,000 pesos, the larger part of which (exact amount unknown) had been appropriated by defendants, including the special partners, fraudulently for their own benefit. Subsequently, when these special partners, as well as the other defendants, failed to put in any defense and allowed all the allegations of of the bill to be taken as true, including these allegations of frauduent conversion of assets, it seemed useless and inconsequent to follow the special remedies which had been prayed for when the direct remedy covered by their general prayer for relief had been left open to them. The decree did, however, grant certain equitable relief, to be used in case it became necessary, in addition to the money decree.

And we submit that that course was well within our rights. We presume it will not be denied that even special partners hold the partnership assets in trust for the creditors. Then when, by a decree *pro confesso*, it was admitted that the special partners had conspired with others to make way with over $40,000 worth of the firm property, why were we not entitled to a decree for the repayment of a quarter of that amount? It will not do to say that we filed the bill to enforce a specific remedy, and are confined to that. The authorities are to the contrary:

> "There are kindred principles in equity jurisprudence whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser, for value, *then its value in money.*" (Italics supplied.)
>
> May *vs.* Le Claire, 11 Wall., 217.

> "The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back into a court of law to establish the validity of his claim. The court, being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits. (Citing cases.) * * * They went into the court for the discovery of assets; and the object of the bill was attained by the admission of the executor that he had sufficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the Court of its jurisdiction."
>
> Kennedy *vs.* Cresswell, 103 U. S., 641.

See also:

Oliver *vs.* Piatt, 3 How., 333, 401.

Bank *vs.* Insurance Co., 104 U. S., 54.

McComb *vs.* Frank, 149 U. S., 629.

Wheeler *vs.* Billings, 18 C. C. A., 573.

Gordon *vs.* Lemp, 7 Idaho, 677, 684.

So far as the contention is concerned that we were not entitled to enter a money decree because such a decree was not specifically prayed for, or was inconsistent with the specific prayer of our bill, no decision of this Court upholds such contention; but there are many to the contrary. It is not necessary to refer specially to more than one recent decision—a decision where the difference between the prayer of the bill and the decree as entered is much greater than in the case at bar—and in that case Justice Peckham, speaking for this Court, laid down the rule as follows:

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers. * * *
>
> "The case made by the bill consists of the material facts therein stated; and where all the facts are stated, it is no reason for denying relief under a general prayer because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill. * * *
>
> "All the facts of fraud set up in the bill, committed by defendants, are, if proved, sufficient to entitle the plaintiff to treat them as trustees *ex maleficio*, and to recover from them, as such trustees, all the materials taken from the mine."
>
> Lockhart *vs.* Leeds, 195 U. S., 427.

And, of course, if the materials had disappeared, so he could not recover them, to recover their value in money, according to the previous cases cited.

Similar applications of the principle have been many times

made, of which we content ourselves with citing the following:

Taylor *vs.* Insurance Co., 9 How., 390, 405.
Texas *vs.* Hardenburg, 10 Wall., 68.
Jones *vs.* Van Doren, 130 U. S., 684.
Tyler *vs.* Savage, 143 U. S., 79.

Wherefore it is urged that the final decree of June 8, 1901, properly included a money decree.

POINT V.

Remaining Grounds of Bill of Review.

All of the alleged grounds for relief contained in the bill of review are set forth in the statement of the case, pages 9 to 11 of this brief. We have, in the foregoing branches of this argument, called attention to the insufficiency in the averments and frivolous character of some of these alleged grounds, showing, we think, beyond question that none of the grounds alleged to be based upon newly discovered evidence are sufficiently averred or tenable, even if filed in time, which is denied.

We have also specially argued the more important alleged "errors apparent," shown that none of them were seasonably or properly raised, and, we believe, further detailed reference to these alleged grounds is unnecessary.

The specifications of error made in the bill of review were evidently drawn on the theory that even the slightest suspicion of irregularity in the proceedings would be reviewed, but such is not the rule. Even when regularly and properly filed, a bill of review will not reach errors in the proceedings unless the final decree violates "some statutory enactment, some recognized principle or rule of law or equity, or the settled practice of the court," and no errors will be open to consideration which are not pointed out in the bill of review.

After quoting the above definition from Daniell's Chancery Practice, Chief Justice Fuller, sitting on circuit, says:

> "The general rule is that such a bill does not lie to correct a mere error, which would, in effect, render it nothing more than a substitute for an appeal."

And, after citing several examples to explain the distinction, the learned Chief Justice proceeds thus with his exposition of the subject:

> "These are manifest errors not open to controversy, and while the modern practice has tended to allow the court of first instance to review or reverse its own decrees, for an erroneous application of the law to the facts found, whenever an appellate tribunal would do so for the same cause, this has certainly not been carried so far as to ignore the rule in principle. That principle is that the remedy for mere error in a final decree is by appeal, and that the error apparent for which such a decree may be impeached by bill of review must be more than the result of mistaken judgment. * * *
>
> "The determination of the question whether the title of a particular act (of a legislature) is comprehensive enough to reasonably include the several objects which the statute assumes to affect is one of great delicacy, and upon which opinions might well differ; and a decree rendered upon one view or the other, while it might be reversed by the appellate court as erroneous, can hardly be said to carry that error upon its face which is required as the basis of a bill of review."
>
> Hoffman *vs.* Knox, 50 Fed. Rep., 484, 490.

To the same general effect are the following:

Randall *vs.* Payne, 1 Tenn. Ch., 137, 142.

Freeman *vs.* Clay, 52 Fed. Rep., 1.

Therefore, we submit that the remaining specifications of minor faults in the original suit should not be considered and need not be further argued, as the reading of them is sufficient to determine their character.

Conclusion.

In submitting this case by stipulation, duly filed under rule 20, it has not been practicable for us to see or consider the brief of counsel fo. appellees.

Although we rely upon and do not abandon any of the assignments of error, there are certain points rai-ed by these assignments which we have not deemed it necessary to discuss in detail, contenting ourselves with a presentation of certain salient propositions which are confidently believed to be sufficient to sustain the appeal.

N. B. K. Pettingill,
George H. Lamar,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 431.

VICTOR FRAENKEL and JOHN H. LUD, Co-Partners under the Firm Name of Victor Fraenkel & Company, and JOSEPH HINNE and HERMAN WOLFRAM, Co-Partners under the Firm Name of Hinne & Company, Appellants,

vs.

MANUEL ORDOÑEZ, ENRIQUE ORDOÑEZ, JOSE ORDOÑEZ, and FRANCISCO ORDOÑEZ, Composing and Doing Business as Ordoñez Hermanos, Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLEES.

Francis H. Dexter,
Attorney for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 411.

VICTOR FRAENKL AND JOHN H. LUIS, COPARTNERS UNDER THE FIRM NAME OF JAFFE BROTHERS & COMPANY, AND JOBST HINNE AND HERMAN WOLFRAM, COPARTNERS UNDER THE FIRM NAME OF HINNE & COMPANY, APPELLANTS,

vs.

MANUEL CERECEDO, ENRIQUE CERECEDO, JOSÉ CERECEDO, AND FRANCISCO CERECEDO, COMPOSING THE COPARTNERSHIP OF CERECEDO HERMANOS, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLEES.

Preliminary Statement.

Appellees consider that a few words of explanation are required to meet the argument of appellants in support of their assignment of error, in which they claim that the bill of review was not seasonably presented to the court below.

Appellants, in that part of their statement which refers

to the first steps taken by appellees herein in connection with their bill of review, say:

> "As soon as efforts were taken to make effective "the executions issued as above stated, said firm of "Cerecedo Bros. employed other attorneys, who, on "the sixth day of February, 1902, filed in the court "their petition for leave to file the bill of review (p. "23) and therewith tendered the appeal itself which "they proposed to file (pp. 27-31). Said counsel, "however, thereafter permitted their petition to lie "without action by the court until the twenty-second "day of June, 1903, on which day the court made "an order granting the same and allowing the filing "of the bill of review (pp. 24-26.)"

The argument is made by counsel for appellants that appellees, or their counsel, were guilty of delay in failing to present the bill of review within the two years from the entry of the final decree, to wit, on June the eighth, 1901.

A reference to the record will disclose that the petition for leave to file the bill of review was presented and actually filed on the sixth day of February, 1902, and that the said petition referred to the bill of review as "herewith tendered to your Honor by petitioners, and *which they pray, for this purpose, may be considered a part of this petition,* etc." (Transcript, page 23).

The record discloses that the bill of review appears to have been endorsed by the clerk "tendered February 6, 1902." Whilst no order appears in the journal of the court referring to the presentation of these documents to show the reason why the judge or the officers of the court endorsed the bill of review "tendered" and not "filed," notwithstanding that it accompanied the petition for leave to file and was to be "considered a part of this petition," the opinion rendered by the court on the twenty-second of June, 1903, sufficiently explains this circumstance. Such opinion, in its opening paragraphs, clearly shows that the petition for leave, and the bill of review itself, were "presented" to the court below on

February the sixth, 1902, safely within the time limited by law.

Appellees did ALL in their power: they lodged their petition and bill in the clerk's office, which were presented by them to the court on the last-named date. Both these documents were under the control of the court since that date, subject to its decision. The delay in actually endorsing the bill of review "filed," was caused by the court and NOT by appellees or their counsel. The action of the court below in causing the bill of review to be endorsed "tendered" and in not permitting it to be filed within the two years, was the result of the practice that has been observed by judges of the Federal Court of the United States District for Porto Rico of requiring all bills of review to be submitted to them before the clerk may actually endorse the same as "FILED."

It seems to us a refinement of technicality to argue that because the bill of review was not marked "FILED" within the two years, that it cannot be availing, notwithstanding that it was presented to the clerk of the court and to the judge thereof within the time limited.

Appellees should not suffer the consequences of the delay of the judge or of the peculiar practice observed by him in requiring bills of review to be submitted to him before being actually marked "FILED" by the clerk.

A just and reasonable interpretation of the law requires only that the bill of review shall be brought to the attention of the opposite party and submitted, or presented, to the court within the time limited by the rule.

When it is considered that the demurrer to the bill of review, which was filed by appellants herein on the thirteenth day of October, 1903, was permitted to remain in a state of quiescence until the first day of June, 1907—when it was acted upon by the court—this court will understand the cause of the delay in obtaining action in the proceedings in the court below.

The appellees contend that the final decree rendered in

the original cause was absolutely null and void, for the ten reasons set forth in the bill of review first presented to the court below and for the additional reasons set forth in the amended bill of review. We believe that, upon a consideration by this court of these objections to the final decree in the original cause, it will be held that the court below acted within the law and equity of the case in giving appellees an opportunity to make a defense in the original case. We believe that this court will consider these reasons as a successful answer to the assignments of error of appellants.

In the opinion of the court, entered June the twenty-second, 1903, it is declared that "*such a state of case is presented that the petitioners should be allowed to file their bill for review, appear, open the decree and make defense; otherwise an injustice may be done.*"

Appellants, in their brief, call the attention of this court to the fact that the said order "not only allowed the filing of the bill of review, but even at that preliminary stage actually vacated the final decree in the original suit, allowed the complainants in the bill of review to make immediate defense to the original bill, and 'these causes' were 'consolidated and ordered to be tried together.'"

Frankly, we believe that this was an error of procedure of the court in so far as it vacated the final decree at that stage of the proceeding; but inasmuch as subsequently the court corrected this error in its order suspending all proceedings in the original case until after the final determination of the questions raised by the bill of review (pages 46-47 of Record), no harm was done to appellants.

ARGUMENT AND BRIEF OF APPELLEES.

The allegations of the bill of review were sufficient to justify the court below in permitting appellees to make defense in the original cause and in subsequently setting aside the final decree therein and dismissing the original bill of complaint.

Ten reasons were set up by appellants in their bill of review. Let us consider these reasons, or such of them as may be considered at this time as pertinent to the discussion of the action of the court below.

POINT ONE.

The court below did not have jurisdiction to entertain the original bill of complaint or to enter the final decree therein.

At the time of the filing of the original complaint, the District Court of the United States for Porto Rico had jurisdiction "of all cases cognizant in the Circuit Courts of the United States and shall proceed therein in the same manner as a Circuit Court."

The bill of complaint described complainants therein as subjects of foreign States, either England or Germany, and all the parties-defendant as citizens of Porto Rico.

We do not deem it necessary to make an argument in support of the proposition that if such an action had been brought in one of the Circuit Courts of the United States it would not have been entertained because of absence of the necessary jurisdiction. Whatever the citizens of Porto Rico were, or may be, they certainly cannot be considered as citizens of a State, as argued by counsel for appellants.

Appellants contend, however, that even though the court was without jurisdiction to entertain the bill of complaint when filed, it acquired jurisdiction under the act of March

2, 1901, and cite in their brief various authorities in support of this proposition. We do not believe that the cases cited are analagous to the one at bar.

In the case below, appellees did nothing which could bring them within the rule of the cases cited by appellants. It is true the record discloses that a special appearance was entered by one Herbert E. Smith in behalf of the "defendants" in the original bill, but no further action was taken by him; and furthermore, appellees assigned as one of the grounds to review the original proceedings, that they did not employ or retain the said Smith or any other attorney to represent them and that they were unaware of the said proceedings.

Appellees filed no pleadings in the original cause by which they submitted themselves to the jurisdiction of the court, nor did they take part in any of the proceedings.

We cannot believe that the court had jurisdiction either to entertain the original bill or to enter the final decree thereon, in view of section 5 of the act of March 3, 1887, and of August 13, 1888 (vol. 1, Compiled Statutes at Large, page 511), providing:

> "That if, in any suit commenced in a Circuit Court, "or removed from a State court to a Circuit Court of "the U. S., it shall appear to the satisfaction of said "Circuit Court, at any time after such suit has been "brought or removed thereto, that such suit does not "really and substantially involve a dispute or con- "troversy properly within the jurisdiction of said "Circuit Court, or that the parties to said suit have "been improperly or collusively made or joined, "either as plaintiffs or defendants, for the purpose of "creating a case cognizable or removable under this "act, the said Circuit Court shall proceed no further "therein, but shall dismiss the suit or remand it to "the court from which it was removed as justice may "require, and shall make such order as to costs as "shall be just: * * * (Part of section omitted "repealed. Act March 3, 1887, c. 373, Sec. 6, and "Act Aug. 13, 1888, c. 866, Sec. 6.)

"In a case where the jurisdiction of the Circuit "Court depended entirely upon divers citizenship "when the suit was commenced, the inquiry into its "jurisdiction is limited to that time; and want of "jurisdiction at the commencement of the suit is not "cured by an answer or plea which suggests a Federal "question."

Colorado Central Consolidated Mining Co. *vs.* Turck, 150 U. S., 138.

See also—

Bogmeyer *vs.* Idler, 159 U. S., 408.

Appellants contend further that the court below had jurisdiction because the original bill involved a Federal question. The case of Antonio Ortega *vs.* Angela Lara, 202 U. S., 339, effectually disposes of this contention.

The court below, being without jurisdiction to entertain the original cause or to enter the final decree therein, it was not only proper but it was its duty—when its lack of jurisdiction was called to its attention—to annul the decree and dismiss the cause. The original proceedings being void for lack of jurisdiction, there was no necessity to proceed with a bill of review.

POINT TWO.

Even if it should be held that the court below acquired jurisdiction by the act of March 3, 1901, it had no power to enter up the final decree upon the allegations of the original bill of complaint against appellees for the payment of the said sums of money found therein to be due; or, in fact, to enter up any decree, ex parte, upon the face of the bill, without proof to establish the allegations thereof.

In so far as appellees are concerned, there was no allegation in the bill which could serve to establish a determinate money indebtedness against them and in favor of the com-

plainants, and not a word of proof was taken to show that they had failed to pay all or any part of their capital subscription in the firm of J. Fernandez & Company.

No showing was made that defendants—J. Fernandez & Company, could not pay.

Even under the allegations of the original bill, complainants therein were entitled in equity only to the protection of the transfer made to them.

The Federal Court in Porto Rico has always proceeded on the assumption that the equity rules promulgated by the Supreme Court of the United States are in force in that court; but by Equity Rule 18 it was improper to have entered up the final decree.

In—

Ohio Central Railroad *vs.* Central Trust Company, 133 U. S., p. 83,

a deficiency decree granted *pro confesso*, was reversed because the bill did not show that the amount thereof was properly due. In the case at bar, complainants in the original cause claimed a transfer of certain securities. The presumption is that these securities operated as a payment and a cancellation of the debt for which they were given.

But, if it should be held that they were only a security in the nature of a mortgage, no deficiency decree could be obtained until it should be ascertained by the court below, the value thereof and the balance, if any, of the indebtedness to which complainants might be entitled. The transfer of the securities to complainants in the original bill—being Exhibit "A" attached thereto—showed, upon its face, that at the time of the decree the debt was not yet due.

The final decree of June 8, 1901, was therefore NULL and VOID, and should have been reviewed and set aside.

See also—

Thomson *vs.* Wooster, 114 U. S., 104.

Noonen *vs.* Braley, 67 U. S., 499.

Crockett *vs.* Lee, 7 Wheaton, 522.

Bates on Federal Equity Procedure, Sec. 166.

We do not deem it necessary to discuss the other grounds set up in the bill of review as a basis for the setting aside of the original decree, except to call the attention of this court to the circumstance that there existed matters of fact as well as "errors of law apparent of record" to justify and require the court below to permit appellees herein at least to make a defense to the original proceedings if not absolutely to nullify the same.

We respectfully submit that the action of the lower court in annulling the final decree and dismissing the original complaint was in accordance with law and equity.

FRANCIS H. DEXTER,
Solicitor for Appellees.

FRAENKL *v.* CERECEDO HERMANOS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 411. Submitted January 10, 1910.—Decided February 21, 1910.

Where a bill of review is presented for filing within the period allowed, and the court delays passing upon the application until after that period has elapsed, the time between tendering the bill for filing and permission given to file is not counted in applying the limitation. *Ensminger* v. *Powers*, 108 U. S. 292.

Jurisdiction is determined as of the time of commencement of the suit, and even though the jurisdiction of the court be enlarged by a subsequent statute so as to include the parties, the court cannot acquire jurisdiction against objection.

After a case has been decided below without reference to any Federal question parties may not for purpose of review by this court inject a Federal question by the suggestion that a Federal right was relied on.

1 Porto Rico Fed. 53, affirmed.

THIS is an appeal from a decree of the District Court of the United States for Porto Rico, upon a bill of review, vacating and annulling a decree entered by that court in an equity cause, and dismissing the bill of complaint in said cause without prejudice.

The bill in the equity cause referred to was filed in December, 1900. The present appellants were complainants. Some of them were alleged in the bill to be copartners doing business in Dundee, Scotland, as Jaffe Brothers & Company, and to be subjects of the Queen of Great Britain and Ireland. The others were averred to be copartners doing business in Berlin, Germany, as Hinne & Company, and to be subjects of the Emperor of Germany. The defendants to the bill were Demetria Bolta and Alfredo Arnaldo y Sevilla, and various other individuals alleged to be the general and special partners of a firm styled J. Fernandez & Co. Among such were Manuel, Enrique, José and Francisco Cerecedo, all of whom were members of a firm styled Cerecedo Hermanos, which firm, it was charged, was a special partner in J. Fernandez & Co. All the defendants were averred to be citizens and residents of Porto Rico.

The allegations of the bill were thus summarized in an opinion rendered in the court below:

"It avers, in substance, that Fernandez & Co., of which firm Cerecedo Brothers were special partners up to the time when Fernandez & Company suspended payment, were indebted to the complainants in certain sums set forth in the bill; that fraudulently and to obtain time the last-named firm agreed with Jaffe Brothers & Company to transfer to them certain securities upon third parties for their debt, but thereafter proposed to turn them over in actual payment *pro tanto*, but when the agent of Jaffe Brothers & Company obtained authority to agree to this, said firm applied for suspension of payments; that to get this they issued false evidences of indebtedness to Cerecedo Brothers and others; that after the suspension of payments Fernandez, as liquidator, fraudulently transferred the securities complainants Jaffe Brothers & Co. were to have to a third party without consideration, and for half of their value, Cerecedo Brothers being in fact the real purchasers; that Fernandez, after the suspension of payments, turned over to Cerecedo Brothers a large amount

of property, the amount being unknown to complainants, and disposed of a large part of the assets fraudulently. Interrogatories were propounded in the bill to Fernandez. The relief sought was a specific performance of the agreement with Fernandez as to the securities; that a receiver be appointed and the assets of Fernandez & Company be marshaled; that Fernandez & Company be enjoined from collecting said securities or interfering with the company's assets; that they be delivered to the receiver, the liens be ascertained, the property sold and distributed among the creditors, Jaffe Brothers & Company being allowed to participate in the distribution, said securities being first applied on their debt."

After the return of service of summons upon the firm, Herbert E. Smith, signing himself "Solicitor for defendants," filed a "special appearance" in the case "for the purpose of moving the court for the compliance on the part of the plaintiffs with the rule of court relative to non-residents giving security for costs, and for the purpose of opposing the motion for an injunction and receiver." On January 14, 1901, a receiver was appointed, who however never qualified. It was recited in the order appointing the receiver that after due notice had been given of an application for temporary injunction, the cause had been fully argued by counsel for the respective parties. Subsequently, on January 31, 1901, by written stipulation between counsel for the plaintiffs and defendants, it was agreed "that the defendants herein may and shall have until the 20th day of February, 1901, for the purpose of demurring to, pleading to or answering the bill of complaint of said complainants herein." Thereafter, on February 23, 1901, a decree *pro confesso* was entered against all the defendants, and complainants were given leave to proceed *ex parte*. On June 8 following a final decree was entered, adjudging the general and special partners in the firm of J. Fernandez & Co. to be indebted to the complainants in specified amounts, cancelling and annulling, as against the rights of complainant, because fraudulent and fictitious, the

alleged indebtedness of the firm of J. Fernandez & Co. to the special partners, cancelling and setting aside as fraudulent the transfers made to the defendant Bolta, and adjudging that the defendants composing the firm of J. Fernandez & Co. pay the amounts found due to the complainant, and that in default of so doing execution should issue. On January 31, 1902, an execution was issued, which was levied upon the property of the firm of Cerecedo Hermanos. Thereupon, on February 6, 1902, there was filed in the court from which the execution issued, on behalf of the members of that firm, a petition praying for leave to file a bill to review and set aside the decree theretofore entered *pro confesso* against them. The petition recited the presentation of the bill of review, and that document was marked as "Tendered February 6, 1902."

Both in the petition and bill of review various errors asserted to be apparent on the face of the record were set out, which, from the view we take of the case, need not be here detailed.

While, as stated, the petition for leave was filed on February 6, 1902, leave to file was not granted until June 22, 1903, on which date the court filed an opinion. 1 Porto Rico Fed. 53. The opening paragraph of the opinion is as follows:

"This is a petition for leave to file a bill of review, which is also tendered. The decree asked to be set aside was entered June 8, 1901. This petition was presented February 6, 1902. Objection is made that it comes too late. It is claimed that the act of Congress of March 3, 1891, relative to the United States Court of Appeals, applies to it. The limitation for appeal, and which, by analogy, has been applied in equity to the time for filing bills of review, applicable, however, is the two years provided in section 1008 of the United States Revised Statutes. *Clark* v. *Killian*, 103 U. S. 766; *Allen* v. *S. P. R. Co.*, 173 U. S. 479."

The court considered two of the grounds assigned in support of the petition for leave to file. One related to the jurisdiction of the court to render the decree and was disposed

of by the statement that all the complainants were aliens. Upon the ground, however, that the averments of the bill in the main cause did not authorize the money decree which had been rendered, it was held that in order to prevent injustice the "petitioners should be allowed to file their bill of review, appear, open the decree, and make defense," upon payment of costs to date and the execution of a bond in the sum of fifteen thousand dollars, conditioned to perform any judgment that might finally be rendered against them. On June 19, 1903, an order was entered permitting the filing of the bill of review, opening the decree in the original cause and permitting the Cerecedos to appear therein and make defense, and ordering the return of the execution upon the giving of bond. The condition as to payment of costs and giving bond having been complied with, thereafter, on October 13, 1903, a demurrer was filed to the bill of review, and at the same time in the main cause a plea to the jurisdiction of the court was filed.

On October 14, 1903, an amended bill of review was filed. Nearly four years afterwards, on June 1, 1907, an opinion was filed, holding that the demurrer to the bill of review and also the plea to the jurisdiction in the main case should be overruled. On the twenty-second of the same month an answer was filed to the bill of review, to which a reply was filed in the following month. On the same day the Cerecedos also demurred to the bill of complaint in the main cause. On April 3, 1908, the court vacated, as improvidently made, the order opening the final decree in the main cause and suspended further proceeding therein until the determination of the questions raised by the bill of review. On October 30 following, however, the court consented to a reargument of the plea to the jurisdiction in the main cause which had been theretofore adversely ruled upon, with the result that on February 1, 1909, the plea to the jurisdiction was sustained. A final decree was thereupon entered upon the issues made upon the bill of review, and after reciting that it appeared upon the

face of the record in the original cause that the court was without jurisdiction to entertain the same, it was decreed as follows:

"It is, therefore, hereby ordered, adjudged and decreed that this bill to review the proceedings of this court in said original cause be, and the same hereby is, sustained for the reason aforesaid; that the decree entered by this court on the 8th day of June, A. D. 1901, in the city of Mayaguez, in favor of complainants in said original suit, the same being as aforesaid No. 6 on the equity docket at Mayaguez, entitled *Jaffe Brothers & Company* and *Hinne & Company* v. *J. Fernandez & Company and Cerecedo Brothers*, be, and the same hereby is, vacated and annulled; and that said original bill of complaint be, and the same hereby is, dismissed without prejudice, with costs of this bill of review in favor of the complainants herein."

The cause was then appealed to this court.

Mr. N. B. K. Pettingill and *Mr. George H. Lamar* for appellant:

A bill of review must be *filed* within the statutory period for taking an appeal or writ of error. *Thomas* v. *Harvie's Heirs*, 10 Wheat. 146; *Central Trust Co.* v. *Grant Locomotive Wks.*, 135 U. S. 207. From the Porto Rico court this would be two years. *Allen* v. *So. Pac. Ry. Co.*, 173 U. S. 479; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149; Rev. Stat., §§ 702, 1008.

The objection to the jurisdiction of the District Court of the United States for Porto Rico was not seasonably raised and under the circumstances of this case the court properly took and retained jurisdiction. *Kennedy* v. *Bank*, 8 How. 586; *Ex parte Watkins*, 3 Pet. 193; *Dowell* v. *Applegate*, 152 U. S. 327, 340.

The lower court had jurisdiction after the act of March 2, 1901, 31 Stats. 953, when the final decree was entered and the passage of that act cured any defect of jurisdiction. *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289; *Richardson* v. *Green*, 61 Fed. Rep. 423, 431; *First National Bank* v. *Radford Co.*, 80

Fed. Rep. 569; *Hoffman* v. *Knox*, 50 Fed. Rep. 484; *Masterson* v. *Howard*, 18 Wall. 99; *Pennsylvania* v. *Bridge Co.*, 18 How. 421.

The original bill also raised a Federal question as the construction of a statute of the United States was involved and that gave the court jurisdiction. *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *Osborne* v. *Bank*, 9 Wheat. 738, 822; *Wyman* v. *Wallace*, 201 U. S. 230.

Mr. Francis H. Dexter for appellees.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The assignments of error which require consideration assail the power of the court below to permit the filing of the bill of review, and also question the validity of its action in vacating the decree entered in the main cause and dismissing the bill filed therein.

Respecting the first, the proposition is that the limit of time within which a bill of review might be filed had expired when leave was given, and that the court should have required payment of the money judgment decreed in the main cause before granting permission to file the bill of review. These contentions are untenable. True it is that in analogy to the time allowed by law for an appeal to this court from a final decree of the District Court of Porto Rico, the bill of review should have been filed in two years from June 8, 1901, the date when the final decree sought to be reviewed was entered, and the bill of review was not actually filed until June 22, 1903. But the bill was presented for filing on February 2, 1902, and it is plain that the failure of the complainants in the bill of review to actually file the same until June 22, 1903, was occasioned by the action of the court in not sooner passing upon the application for leave to file. Under such circumstances, we think the time which elapsed between the

tendering of the bill for filing and the permission given to file should not be counted in applying the two years' limitation. *Ensminger* v. *Powers*, 108 U. S. 292. As respects the granting of permission to file the bill of review, the court was vested with a judicial discretion to permit such filing without a previous payment of the moneys awarded by the decree sought to be reviewed, and there was no abuse of such discretion in giving leave to file, conditioned upon the furnishing of the indemnity bond which was thereafter executed.

As to the alleged error in vacating the decree entered in and dismissing the original cause.—In the court below the allegation attacking the jurisdiction of the court over the original cause was as follows:

"That this court did not have jurisdiction of the original cause and bill of complaint, for the reason that, according to the allegations of said bill, all the parties plaintiff were foreign subjects, and all the parties defendant were citizens of Porto Rico, there being no citizen of the United States or of a State of the United States a party defendant, and no other or sufficient ground or reason for the jurisdiction of this court is in the said original bill set forth sufficient to give this court jurisdiction of the said cause."

The bill in the main cause was filed in December, 1900. At that time the jurisdiction of the court below was fixed and limited by § 34 of the act of Congress of April 12, 1900, commonly known as the Foraker Act, which established civil government in Porto Rico. It was provided in the section that the District Court of the United States for Porto Rico "shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court." That, in view of the parties to the controversy, the case would not have been cognizable in a Circuit Court of the United States is obvious, and hence, manifestly, the court below was without jurisdiction under the act of 1900. It is urged, how-

ever, that as the final decree in the main cause was entered in June, 1901, although the court was clearly without jurisdiction to entertain the cause when the bill was filed, as no question as to jurisdiction had been raised, the court had power to enter the decree by virtue of the third section of the act of March 2, 1901, 31 Stat. 953, chap. 812, reading as follows:

"That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Pacific R. Co. v. *Ketchum*, 101 U. S. 289, 298, is cited as authority for the proposition. In that case, however, not only was no objection made by the parties in the progress of the cause to the right of the court to proceed, but the decree when rendered was consented to, and the ruling was that although "Consent cannot give the courts of the United States jurisdiction, it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained." A brief consideration, however, of the circumstances in this case demonstrates that the *Ketchum case* is not in point. The last appearance of the defendants in the litigation in the main cause was on January 31, 1901, when a stipulation was made in respect to the time for pleading to the bill, and, of course, an exertion of jurisdiction by the court was neither invoked by the defendants nor consented to by them after the enactment of the amendatory statute of 1901. Under such circumstances it cannot be held that the defendants were estopped from availing of the objection of want of jurisdiction.

The additional contention is made that the case presented by the bill in the main cause was one arising under the laws of the United States, and that because thereof jurisdiction

existed, irrespective of the want of citizenship of the parties. The argument is that the complainants, in their bill, made reference to the provisions of an order of the military governor of Porto Rico concerning "suspension of payments," which, if given proper effect, would have prevented the accomplishment of the fraud which it was the object of the bill to prevent. This order thus referred to, it is said, was, in legal effect, a law of the United States, and the reference to and reliance upon its provisions was an invoking of the jurisdiction of the court on the Federal ground that the case was one arising under the laws of the United States. In our opinion, however, there is not even color for the proposition that the bill presented a controversy arising under a law of the United States, even if the military order referred to be treated as a law of the United States. To sustain such a contention it must appear that a controversy of that nature was called to the attention of the lower court in such a way as to invoke its action thereon. In other words, after a case has been decided below parties may not, for the purpose of a review by this court, attempt to inject a Federal question into the cause by suggesting that it would have been possible by a latitudinarian construction of the pleadings to suggest that a right under the Constitution or a law of the United States was relied upon. And of course in saying this we must not be understood as intimating that the assumed Federal question, even if it had been called to the attention of the court below, would have had sufficient substantiality to have been the basis for jurisdiction.

Affirmed.